

No. 11781

United States
Circuit Court of Appeals
For the Ninth Circuit.

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

JAN 23 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature. errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

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In the United States District Court, for the
Northern District of California, Southern
Division

Civil Action No. 25228-G

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF TAXES
ILLEGALLY COLLECTED

Plaintiff complains of defendant and for cause
of action alleges:

I.

Plaintiff is, and at all times herein referred to
was, a corporation organized and existing under
and by virtue of the laws of the State of California
qualified to, and doing business in the Southern
Division of the Northern District of California and
elsewhere, and is a citizen of the United States of
America.

II.

Plaintiff is now and for many years last past and
at all times herein mentioned has been the Owner
and Publisher of the San Francisco Examiner and
the San Francisco Call-Bulletin, each of which is
a daily newspaper, published, printed, sold, circ-

lated and distributed in the City and County of San Francisco, State of [1*] California.

III.

This is an action for the recovery of Social Security and Federal Unemployment Taxes erroneously and illegally collected under the provisions of Title IX of the Social Security Act and the Federal Unemployment Tax Act, from plaintiff. It is brought against the United States of America.

IV.

At all times as used herein the term "News Vendor" means a person over the age of eighteen (18) years who purchased newspapers at wholesale from the Plaintiff publisher and resells the same at retail upon the public streets in the City and County of San Francisco, State of California.

V.

Heretofore, and on or about the 9th day of February, 1942, the Collector of Internal Revenue for the 1st District of California issued and sent to plaintiff his Notice and Demand for Tax Due under Title IX of the Social Security Act demanding payment within ten days from said date of the sum of \$1,302.01 tax, and interest in the sum of \$312.48, a total of \$1,614.49, alleged to be due for the period, January 1, 1937, to December 31, 1937, under the provisions of said Act on the assumed or alleged earnings of News Vendors selling the

* Page numbering appearing at foot of page of original certified Transcript.

San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco.

VI.

Thereafter, and on or about February 14, 1942, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written protest and claim for refund of the said sum of \$1,614.49. A copy of said written protest and claim for refund is hereunto attached marked Exhibit "1" and is by this reference made a part hereof. Plaintiff in said written protest and claim for refund [2] stated the grounds of said protest and the basis of the said claim for refund.

VII.

Thereafter the Commissioner of Internal Revenue disallowed and rejected the said claim for refund and pursuant to the provisions of Section 3772(a)(2) of the Internal Revenue Code the Commissioner of Internal Revenue by registered letter bearing date July 13, 1945, advised plaintiff that said claim for refund was disallowed. A copy of the said letter is hereunto attached marked Exhibit "2" and is by this reference made a part hereof.

VIII.

That the San Francisco Examiner and the San Francisco Call-Bulletin, each a daily newspaper, for many years last past and at all times herein mentioned have been sold at retail on the public streets of the City and County of San Francisco, State of California, by news vendors. Said news

vendors purchase copies of the San Francisco Examiner and the San Francisco Call-Bulletin at a wholesale rate per 100 copies and thereafter sell said newspapers to buyers thereof at the retail sale price of five cents per copy for each copy of the daily issue of said newspapers and at the established retail sale price for the Sunday issue of said San Francisco Examiner.

IX.

At all times herein mentioned the profit to news vendors has been and now is the difference between the wholesale price per 100 copies and the retail sales price per copy charged by said news vendors to the purchasers thereof.

X.

In the year 1937 the news vendors joined together in an organization and represented to the plaintiff that as an organization they desired to enter into a contract providing, among other things, for the purchase and sale of newspapers in said City. [3]

Thereafter, after negotiations between plaintiff and said organization, said parties agreed upon the conditions to be incorporated in a contract providing, among other things, for the purchase and sale of newspapers in said City. Said contract was reduced to writing and on or about August 31, 1937, was signed by plaintiff, and the said organization of news vendors. A copy of said contract is hereto attached marked Exhibit "3" and is by this reference made a part hereof.

XI.

During all of the period of the negotiation of the said contract, Exhibit "3", and at the time of the execution thereof it was the intent and purpose of the organization of news vendors and of plaintiff to create and maintain as between the news vendors and plaintiff the relationship of buyer and seller and to establish and maintain the news vendors as independent contractors.

XII.

Subsequent to the execution of the said contract, Exhibit "3", and throughout the term thereof, the said news vendors and plaintiff construed and interpreted said contract as establishing as between said parties the relationship of buyer and seller and construed and interpreted the status of the news vendors under the provisions of said contract as that of independent contractors and not otherwise. Said parties throughout all of the terms of said contract acted with the intent and in the belief that the said contract would be interpreted and construed as intended by said parties.

XIII.

Thereafter on January 24, 1939, and May 28, 1940, and August 31, 1942, and August 28, 1944, said parties entered into new contracts. Each of said contracts [4] provide, among other things, for the purchase at wholesale and to the sale at retail by said news vendors of newspapers on the streets

of the City and County of San Francisco, State of California, and are similar in text, with some modifications, to the contract of August 31, 1937, Exhibit "3", but the terms of none of which subsequent contracts modified or purport to modify in any respect the independent relationship of the parties thereto.

XIV

During all of the period of negotiation of each of the said four contracts subsequent to Exhibit "3" and at the time of the execution of each thereof it was the intent and purpose of the organization of news vendors and of plaintiff to maintain the relationship of buyer and seller and to maintain the status of said news vendors as independent contractors. Said parties during the term of said contracts have acted with the intent and in the belief that the said contracts would be interpreted and construed as intended by said parties.

XV.

That none of the news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin, each a daily newspaper, on the streets of the City and County of San Francisco, State of California, are now and none thereof have at any time been employees of plaintiff. Said news vendors are now and always have been independent contractors purchasing from plaintiff newspapers at a wholesale price per 100 copies and thereafter selling said newspapers at retail to the public at a retail price.

That plaintiff neither has nor exercises nor claims to have or exercise any control or any right to control over the means and methods of said news vendors or any of them in the retail sale of said newspapers to the public on the public streets of the City and County of San Francisco, State of California, and said news vendors are responsible to plaintiff for the results [5] accomplished in the retail sale of said newspapers to the public and on the public streets in said City only.

XVI.

That there is no liability of plaintiff under Title IX of the Social Security Act for the sum of \$1,302.01 tax, and interest in the sum of \$312.48, a total of \$1,614.49, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, January 1, 1937, to December 31, 1937.

XVII.

No part of the sum of \$1,614.49 claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been repaid, nor has the same or any thereof been credited upon the admitted liability for Social Security and/or Federal Unemployment Tax of plaintiff and the whole thereof, together with interest thereon as allowed by law is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, Plaintiff demands judgment against

defendant for the sum of \$1,614.49, interest and costs.

Count II

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV, VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this complaint.

II.

Heretofore, and on or about the 23rd day of January, 1943, the Collector of Internal Revenue for the First District of California, issued and sent to plaintiff his Notice and Demand for Tax Due Under Title IX of the Social Security Act, demanding payment within ten days from said date of the sum of \$2,048.41 tax, and interest in the sum of \$423.06, a total of \$2,531.47, alleged to be due for the period, January 1, 1938, to December 31, 1939, under the provisions of said Act on the assumed or alleged earnings of news vendors selling the San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter and on or about the 22nd day of January, 1943, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written protest and claim for refund of the said sum of \$2,531.47. A copy of said written protest and claim for refund is hereunto attached marked Exhibit

"4" and is by this reference made a part hereof. Plaintiff in said written protest and claim for refund stated the grounds of said protest and the basis of the said claim for refund.

IV.

That there is no liability of plaintiff under the Social Security Act for the sums of \$2,048.41 tax, and interest in the sum of \$483.06, a total of \$2,531.47, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City and County of San Francisco, State of California, for and during the period, January 1, 1938, to December 31, 1938.

V.

No part of the sum of \$2,531.47, claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been refunded nor has the same or any thereof been credited upon the admitted liability for Social Security or Federal Unemployment Insurance Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law, is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$2,531.47, interest and costs. [7]

Count III

I.

Plaintiff realleges as though set out herein in full all of the allegations of Paragraphs I, II, III, IV,

VIII, IX, X, XI, XII, XIII, XIV and XV of Count I of this complaint.

II.

Heretofore, and on or about the 2nd day of February, 1945, the Collector of Internal Revenue for the First District of California issued and sent to plaintiff his Notice and Demand for Tax Due Under Title IX of the Social Security Act, demanding payment within ten days from said date of the sum of \$1,765.59 tax, and interest in the sum of \$422.17, a total of \$2,187.76, alleged to be due "for the calendar year 1940," under the provisions of said Act on the assumed or alleged earnings of News vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the City of San Francisco.

III.

Thereafter, and on or about the 12th day of February, 1945, plaintiff paid said sum to the Collector of Internal Revenue for the First District of California and at the same time filed its written protest and claim for refund of the said sum of \$2,187.76. A copy of said written protest and claim for refund is hereunto attached marked Exhibit "5" and is by this reference made a part hereof.

Plaintiff in said written protest and claim for refund stated the grounds of said protest and the basis of the said claim for refund.

IV.

That there is no liability of plaintiff under the Social Security Act for the sums of \$1,765.59 tax,

and interest in the sum of \$422.17, a total of \$2,187.76, or any other sum, upon the assumed or alleged earnings of news vendors selling the San Francisco Examiner and/or the San Francisco Call-Bulletin in the [8] City and County of San Francisco, State of California, for and during "the calendar year 1940."

V.

No part of the sum of \$2,187.76, claimed by plaintiff as a refund as alleged in Paragraph VI hereof has been refunded nor has the same or any thereof been credited upon the admitted liability for Social Security or Federal Unemployment Insurance Tax of Plaintiff and the whole thereof, together with interest thereon as allowed by law, is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of \$2,187.76, interest and costs.

That by reason of the premises, plaintiff is entitled to judgment against defendant for the aggregate sum of \$6,333.72, together with interest as prayed in each cause of action hereinabove pleaded, as provided by law; for costs of suit, and for such other relief as to the Court may seem meet and just.

Dated, San Francisco, California, October 11, 1945.

FINK & KEYSTON,

By /s/ GROVE J. FINK,

Attorneys for Plaintiff. [9]

State of California,
City and County of San Francisco—ss.

Clarence R. Lindner, being first duly sworn, deposes and says:

That he is Vice-President of Hearst Publications, Incorporated, the plaintiff named herein; that he has read the above and foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

/s/ CLARENCE R. LINDNER.

Subscribed and sworn to before me this 11th day of October, 1945.

[Seal] /s/ KATHARINE T. McDONNELL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed] Filed Oct. 11, 1945. [10]

Note

The exhibits attached to the complaint are identical with exhibits offered in evidence. The following table shows the exhibit number in the complaint and the corresponding exhibit number of the same document as introduced in evidence.

Exhibit Number In Complaint		Plaintiff's Exhibit Number in Evidence
1	.....	21
2	.....	22
3	.....	4
4	.....	23
5	.....	24

District Court of the United States for the Northern
District of California, Southern Division

Civil Action File No. 25228-G

HEARST PUBLICATIONS, INCORPORATED,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Messrs. Fink & Keyston, plaintiff's attorneys, whose address is: 1018 Hearst Building, San Francisco, Calif., an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

C. W. CALBREATH.

Clerk of the Court.

By WM. J. CROSBY,

Deputy Clerk.

Date: Oct. 11, 1945. [12]

[Endorsed]: Received Oct. 16, 1945 U. S. Marshal's Office, San Francisco, Calif., Civil 26746.
Filed Oct. 18, 1945, C. W. Calbreath, Clerk.

[Title of District Court and Cause.]

ANSWER

For answer to the complaint herein, the defendant states as follows:

1. Defendant admits the allegations of paragraphs I, II and VII of Count I and paragraphs III of each of Counts II and III of the complaint.

2. Defendant denies the allegations of paragraphs XV, XVI and XVII of Count I and paragraphs IV and V in each of Counts II and III of the complaint.

3. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs IV, IX, XI, XII, XIII and XIV of Count I of the complaint and therefore denies every allegation therein.

4. Answering paragraph V of Count I and paragraph II in each of Counts II and III of the complaint, defendants admits the allegations thereof, except that defendant denies that the tax therein referred to was based on the assumed or alleged earnings of news vendors selling the San Francisco Examiner and the San Francisco Call-Bulletin in the City of San Francisco, and alleges that said tax was measured by the remuneration received by said vendors as employees of the plaintiff in the sale of said newspapers.

5. Answering paragraph VI of Count I of the complaint, [13] defendant admits the allegations

thereof, except with respect to the date of February 14, 1942, therein referred to, which is denied and is alleged to be February 16, 1942.

6. Answering paragraph VIII of Count I of the complaint, defendant admits the allegations of the first sentence thereof and denies the allegations of the second sentence thereof.

7. Answering paragraph X of Count I of the complaint, defendant admits that Exhibit "3" to the complaint is a true copy of a document executed by the persons whose signatures are subscribed thereto, but denies every other allegation therein.

8. Answering paragraph I in each of Counts II and III of the complaint, defendant incorporates by reference its answer to the paragraphs of the complaint therein referred to.

Wherefore, defendant prays that judgment be entered against plaintiff for costs and all other proper relief.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed Jan. 15, 1946. [14]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the
United States for the Northern District of Califor-
nia, Southern Division, held at the Court Room
thereof, in the City and County of San Francisco,
on Monday, the 28th day of January, in the year of
our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 25228-G

HEARST PUBLICATIONS, INC., etc.,

vs.

UNITED STATES OF AMERICA,

No. 25229-G

HEARST PUBLICATIONS, INC., etc.

vs.

UNITED STATES OF AMERICA.

Minute Order January 28, 1946

ORDER CONSOLIDATING CASES No. 25228-G
AND 25229-G FOR TRIAL

The two above-entitled cases came on regularly
this day for hearing of motion to set for trial in each
case. After hearing G. D. Keyston, Esq., attorney
for plaintiff, and E. Bonsall, Esq., Assistant U. S.
Attorney, it is Ordered that said cases be consoli-
dated for trial on March 28, 1946 (Court). [15]

In the Southern Division of the United States District Court for the Northern District of California

Civil No. 25228-G

HEARST PUBLICATIONS, INCORPORATED, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR JUDGMENT ON THE
PLEADINGS

The defendant respectfully moves the Court that judgment be entered in favor of the defendant and against the plaintiff in the above-entitled cause, for the reason that the complaint in said cause does not state a claim upon which relief can be granted.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ W. E. LICKING,
Assistant United States Atty.,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 22, 1946. [16]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the
United States for the Northern District of California,
Southern Division, held at the Court Room
thereof, in the City and County of San Francisco,
on Thursday, the 28th day of March, in the year of
our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 25228-G, No. 25229-G

HEARST PUBLICATIONS, INC.,

vs.

THE UNITED STATES OF AMERICA.

No. 25230-G, No. 25231-G

THE CHRONICLE PUBLISHING CO.,

vs.

THE UNITED STATES OF AMERICA.

Minute Order March 28, 1946

ORDER CONSOLIDATING FOUR CASES
FOR TRIAL

These cases came on regularly this day for trial
before the court sitting without a jury. Grove Fink,
Esq., was present on behalf of the plaintiff, and
Mr. Ladar appeared on behalf of the Newspaper and
Periodical Vendor's Union as amicus curiae for the
plaintiff. Arthur L. Jacobs, Esq., and William Lick-
ing, Esq., were present on behalf of the defendant,

and Clarence Linn, Esq., appeared on behalf of the Attorney General of the State of California as amicus curiae. On motion of Mr. Fink, the four cases were ordered consolidated for the purposes of this trial. Mr. Jacobs made a motion for judgment on the pleadings on which a ruling was withheld. After opening statements by Mr. Fink and Mr. Jacobs, the case proceeded to trial. Eugene F. Bitler and William Parish were sworn and testified on behalf of the plaintiff, and the plaintiff introduced Plaintiff's Exhibits Nos. 1 to 45, inclusive, which were admitted into evidence. The defendant introduced Defendant's Exhibit A, which was admitted into evidence. Ordered that said cases be continued until March 29, 1946, for further trial. [17]

In the Southern Division of the United States District Court for the Northern District of California

Civil Actions Nos. 25229-S and 25228-G

HEARST PUBLICATIONS, INCORPORATED, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR JUDGMENT

The defendant respectfully moves the Court for judgment in favor of the defendant for the reasons

that under the pleadings, the evidence and the law:

1. The services performed by the plaintiff's news vendors were performed in the employment of the plaintiff within Sections 801, 804, 811 (b), 901 and 907 (c) of the Social Security Act, and within Sections 1400, 1410, 1426 (b), 1600 and 1607 (c) of the Internal Revenue Code.

2. The news vendors engaged in the sale of the newspapers published by the plaintiff were the employees of the plaintiff.

3. The determination of the Commissioner of Internal Revenue that the plaintiff's news vendors were its employees is presumptively correct and the plaintiff has failed to rebut that presumption.

4. The plaintiff has the burden of proving that the plaintiff's news vendors were independent contractors, which burden it has failed to sustain.

5. The taxes in question were legally assessed and lawfully collected.

6. The plaintiff has failed to prove a cause of action against the defendant. [19]

7. The record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

8. The defendant is entitled to judgment dismissing plaintiff's complaints.

9. The plaintiff is not entitled to refund of any taxes imposed by Section 801 of the Social Security Act and Section 1400 of the Internal Revenue Code, since there is no statement in the claim for refund of such amount or proof upon the trial that

such taxes were repaid to the employees with respect to whom the taxes were imposed or that the plaintiff has the written consent of such employees for such refund.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

By /s/ WILLIAM E. LICKING,

Assistant United States

Attorney.

[Endorsed]: Filed April 2, 1946. [20]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 29th day of July, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

Minute Order of July 29, 1946

ORDER SUBMITTING CASES

The four above-entitled cases came on regularly this day for submission. On motion of Mr. Colvin, Assistant U. S. Attorney, it is Ordered that each of said cases be submitted. [21]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 2nd day of January, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

Minute Order January 2, 1947

ORDER THAT JUDGMENT BE ENTERED
FOR DEFENDANT IN ALL FOUR CASES
UPON FINDINGS OF FACT AND CON-
CLUSIONS OF LAW TO BE PRESENTED

The four above-entitled cases heretofore having been tried before the Court sitting without a jury and submitted to the Court for consideration and decision, and the same having been fully considered, it is Ordered that judgment be entered for defendant in all four cases upon findings of fact and conclusions of law to be presented in accordance with the written opinion filed on this date. [22]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25228, No. 25229

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 25230, No. 25231

THE CHRONICLE PUBLISHING COMPANY,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Fink & Keyston, 1018 Hearst Building, San
Francisco, California, Attorneys for Plaintiff.

Frank J. Hennessy, United States Attorney;
William E. Licking, Assistant United States At-
torney, San Francisco, California; Douglas W.
McGregor, Assistant Attorney General; Andrew D.
Sharpe and Arthur L. Jacobs, Special Assistants
to the Attorney General, Washington, D. C.,
Attorneys for Defendant.

S. A. Ladar, 111 Sutter Street, San Francisco, California, Attorney for Newspaper & Periodical Vendors and Distributors Union No. 468, *Amicus Curiae*.

OPINION

Goodman, District Judge.

By these four actions, consolidated for trial, plaintiff newspaper publishers seek refund of insurance contributions and unemployment taxes collected from them, for taxable periods within the years 1937-1940, upon the compensation received by vendors of their publications on the streets of the City of San Francisco who, it is claimed by plaintiffs, were not their employees. The single issue to be here determined is the status of these vendors during that period. If their relationship to plaintiffs was one of employment within the purport of the applicable statutes, (Social Security Act, Title VIII and Title IX, 42 USCA Sec. 1001-1100; Federal Insurance Contributions Act, 26 USCA Int. Rev. Code, Sec. 1400-1432; Federal Unemployment Tax Act, 26 USCA Int. Rev. Code, Sections 1600-1611) the taxes were properly imposed; otherwise not.

The Facts

Plaintiffs are owners and publishers of daily newspapers circulated primarily in San Francisco; a substantial portion of this circulation is effected through street sales by the news vendors whose status is here in issue. During all of the period

here involved, (1937-1940) except from April, 1937 to August, 1937, plaintiff publishers and their vendors were governed in their relationship by successive written contracts between the San Francisco Newspaper Publishers' Association, as the publishers' representatives, and the Newspaper and Periodical Vendors' and Distributors' Union No. 468 representing the vendors. (The latter is a labor union chartered by the American Federation of Labor.) Three such written contracts were negotiated during the pertinent taxable period, in [23] 1937, 1939 and 1940. However, all the contracts are admittedly similar in such of their terms as are here material. And although there was no written agreement between publishers and vendors from April 1937 to August 1937, their relationship was akin to that established by the succeeding written contracts, except for the exercise of a greater degree of control by the publishers over activities of the vendors in matters which were thereafter settled by the terms of the negotiated contracts.

The facts bearing on the relationship between publishers and vendors as fixed by contract and as appearing from their actual operations during the period here involved are these:

The vendors were engaged by the publishers to sell newspapers at particular street locations. Prior to 1939, such vendors would apply directly to the publishers for assignment to any vacant street corner. After 1939, the union contracts required that vendors be selected by the publishers from a list of available vendors furnished them on request

by the vendors' union. The street sales locations were situated at corners characterized as full time corners, part time corners, special wrapped edition corners and special event corners. (There were also roving vendors called bootjackers who sell papers at large.) Such locations were designated, limited, changed, discontinued or re-established entirely at the publishers' discretion and in order to coincide with changing public demand. Prior to the first contract of August 1937, the services of a vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location, was entitled by each of the successive contracts, to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries of papers to him (e.g. drunkenness, failure to appear for work, etc.) or for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If a vendor felt that his contract to sell at a particular location had been unjustly discontinued by the publisher,—that is, without cause,—he could have the matter submitted to and determined by arbitration.

The publishers fixed the so-called "retail" price at which the papers were to be sold publicly as well as the so-called "wholesale" price, which was the amount charged the vendors for papers delivered them for sale. Once fixed, these prices remained constant for the duration of the union contract then in force. The difference between the "wholesale"

and "retail" price established by the publishers was the vendor's profit. But in addition thereto, he was guaranteed by contract a minimum weekly profit. The papers which he did not sell, he was privileged to return to the publisher and received credit therefor.

Within certain limits prescribed by contract, the publisher fixed for the various types of corner, the days and hours of sale, which were established to coincide with news releases, the public's reading habits and its concentration at particular locations at particular periods.

As each edition left the press, the papers were delivered to the vendors at their corners by employees of the publishers called "wholesalers." The quantity delivered did not rest in the vendor's discretion, but depended on what it was estimated the vendor, during the selling period, could dispose of at his location. And disagreement as to the number of papers the vendor should take appeared to be a matter for settlement between the publisher and the union.

Prior to August 1937, the wholesaler gave orders to the vendors in matters connected with the performance of their duties and disciplined them for failure to comply. But after August 1937, the wholesalers exercised little direct control over the vendors, although they did make suggestions, observed the conduct of the vendors and reported misfeasances to the publisher. Their chief [24] function was to deliver papers to the vendors at each edition time, survey their particular district between editions to see if more papers were needed

at a particular sales location, or if surplus papers should be transferred from one to another location. However, in case a wholesaler observed conduct of a vendor warranting dismissal, the evidence shows that the wholesaler would check-in the vendor before the end of the day's selling period. But any disciplining of news vendors, short of discontinuance of sales to them, was affected by union representatives.

In their sales to the public, the vendors were required to sell complete newspapers only, with sections in such order as was designated by the publishers. They were free to offer the papers for sale as they saw fit, except that they were expected to be at their corners at press release time, to stay there during the sales period, to be able to sell papers and to take an interest in selling papers.

The vendors had no expenses to bear and assumed no business risks except the risk of loss of papers delivered to them for sale and charged against them. They provided their own transportation to and from their sales locations. Some employed substitutes. They were not prohibited from selling non-competitive publications and other articles along with their newspaper sales, and some so did. (In 1937-1940 about 1/6 of the approximate 650 vendors were selling other articles and non-competitive publications.)

The vendors were not required to submit any form of report. There were no conferences or sales meetings which they were obliged to attend, nor was it necessary that they report to the publishers' premises for any purpose.

All advertising placards and display stands or racks were provided by the publisher and the vendors were forbidden to place anything on such stands or racks except newspapers.

In all of the contracts there was contained a clause declaring it to be the intent of the parties to maintain the relationship of seller and buyer between publisher and vendor and not an employer-employee relationship. The clause was inserted at the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment. They were disinterested in the designation of their status. They were also of the belief that in any event, their relationship with the publisher would not legally be regarded as that of employer-employee.

Discussion

The Federal Social Security Statutes (1) do not themselves define the terms "employment," "employer," or "employee" beyond stating generally that the term "employment" means any service performed by an "employee" for his "employer." The interpretive regulations of the Treasury Department (2) adopt as their criteria the indicia of the employment relationship established by the common law. The regulations do not,—no more than does the common law,—*adopt any test factor or factors as complete proof of the presence or absence of the employment relationship. They and the common law which they follow, have left ample room within

*Restatement of the law of Agency C.7, sec. 220.

the pattern they have set, for extensive or restrictive development through the judicial interpretive process, to meet changing and varying circumstances.

- (1) Social Security Act, 42 USC 1107, 1011.
Federal Insurance Contributions Act, 26 USC 1426 (b)
Federal Unemployment Tax Act 26 USC 1607 (c)
- (2) Treas. Reg. 91 Art. 3; Treas. Reg. 90 Art. 205;
Treas. Reg. 106, Sec. 402.204; Treas. Reg. 107
Sec. 403.204.

This seems clear to me, because it is evident from a study of the decisions interpreting the term "employment" in Social Security legislation, that, by and large, many courts essentially adhere to common law doctrines in reaching a desired result, while at the same time they ostensibly repudiate these doctrines in favor of newer and yet incompletely defined precepts.

The plaintiffs, pointing to the Treasury Department's interpretative regulations and to language used in federal and state court decisions, insist that common law tests control; wherefore, they argue, there is no employment relationship here present. In substantiation they point to factors in each case which, under common law principles, are "indicia" (but indicia, alone) of an independent contract relationship.

The United States contends that common law tests are not controlling, developed as they were in

connection with the imposition of vicarious liability in tort and for other unrelated purposes. It advances the doctrine that in view of the broad humanitarian objectives of the national social security laws, the term "employment" as there used must be interpreted to refer to any service relationship not incidental to the pursuit of an independent calling.

The United States relies upon the theme developed in the case of *National Labor Relations Board v. Hearst Publications, Inc.* 322 U. S. 111. There, a finding of employment, in the case of newspaper vendors, by the National Labor Relations Board, within the meaning of National Labor Relations Act, entitling the vendors to collective bargaining rights, was not disturbed because it had "warrant in the record" and a "reasonable basis in law." In the course of its opinion, however, the Supreme Court, in tacit approval of such finding, declared that in remedial federal legislation of the character there under consideration, the term "employment" covered a wider field than would be the case if common law principles were strictly adhered to; but that, nevertheless, it did not embrace within itself all "persons who may perform services for another or to ignore entirely legal classifications made for other purposes;" and that, interpreting the term in the light of the statutory objectives, "it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful ef-

fects in the special situation.” This language, apparently, strikes the keynote of the Government’s position that all persons performing services for others not in the pursuit of an independent calling are employees within the remedial legislation. It is obviously assumed that all such workers are peculiarly subject to the hazards of unemployment and old age indigency. (It is significant that, while propounding this legal the doctrine, the Government also finds comfort in the contention that such persons really were employees even under common-law standards.)

The language of the Supreme Court does not, in my opinion, demonstrate the broad principle contended for by the Government. Undoubtedly it is true that the intent of Congress was to provide for the general welfare through the establishment, in advance, of a provident fund for the needy worker by a system of taxation. Whether or not the general welfare, however, will be advanced, retarded or perhaps defeated by the Government-contended construction of the comparatively unabstruse term “employment so as to included persons who heretofore have always been regarded as independent contractors, is primarily a political, social and economic question for lawmaking rather than law interpreting.* And until Congress has spoken expressly to include such persons, it seems more con-

*It could be argued that the general welfare as well as that of the aged and unemployed would be hampered if, by too broad classification, the burden of taxation upon the employer class would reach beyond its capacity to absorb the load or pass it on.

sonant with established principles of judicial statutory construction to hold that the term "employment" should properly be interpreted in a realistically practical sense, according to established common law doctrines; in favor, however, of the employment relationship in doubtful cases, because of the remedial nature of the statutory objectives. This seems to be the real, underlying motif of all the federal and state decisions,—including that of the Supreme Court—which have so far dealt with the problem of cataloguing particular factual situations either within or without the employment relationship.

From these various decisions there evolves at least one principle,—determinative of this cause in favor of the employment status,—entirely reconcilable with established common law doctrines as developed and grown to meet new situations, and with the remedial objectives of social security legislation, and which is, at the same time realistically practical. That is, that any person is an employee within the meaning of social security legislation who is engaged as a means of livelihood in regularly performing personal services which (1) constitute an integral part of the business operations of another; (2) are not incidental to the pursuit of a separately established trade, business or profession,—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large; and (3) are subject to a reasonable measure of general control over the manner and

means of their performance. *Matcovich v. Anglim*, 134 F. 2d 834 (9th Cir. 1943.); *General Wayne Inn. v. Rothensises*, 47 Fed. Supp. 391 (D.C. Penn. 1942); *Stone v. U. S.* (D.C. Penn. 1943) 55 Fed. Supp. 230; *United States v. Vogue, Inc.* (4th Cir. 1944) 145 F. 2d 609; *Lakie, Inc. v. U.S.A.* (D.C. Mich. Feb. 2, 1946); *United States v. The Wholesale Oil Co.* 154 Fed. 2d 745 (1946 10th Cir.); *Twentieth Century Lites, Inc. v. California Department of Employment* (Apr. 1946) 28 A.C. 67; *Deecy Products Co. v. Welch* (1st Cir. 1941) 124 F. 2d 592; *Jones v. Goodson* (10th Cir. 1941) 121 F. 2d 176.

Whether, absent any of the foregoing factors, the employment status may still be found, is not germane to the case here under consideration, (since it will be shown that all such factors are present). It presents a problem better left to future solution through the evolutionary judicial process of inclusion and exclusion. Sufficient to this case it is that the persons whose status is to be determined come well within the term "employee" as the decisions have so far reconcilably defined those factors which, when appearing in combination, establish the employment relationship in Social Security legislation.

It is, however, relevant to observe that wherever in the interpretation of Social Security legislation the employee status has been rejected in favor of the independent contractor or non-employment relationship, it has been on the basis of either the presence of a separate,—albiet interdependent,—

trade business, or profession involving capital outlay and the assumption of substantial business risks, or the offering of like services to the public in general,—or of the absence of any right of control over the manner and means of performance; or of both the presence of the former and the absence of the latter factor. *United States v. Aberdeen Aerie* No. 24, 148 F 2d 655 (9th Cir. 1945); *United States v. Silk*, 155 Fed. 2d 356 (1946 10th Cir.); *Nevin v. Rothensies*, 8 Fed. Supp. 460 (Pa. 1945); *Ridge Country Club v. U.S.* 135 F 2d 718 (7 Cir. 1943); *Anglim v. Empire Star Mines Co.* 129 Fed. 2d 914 (9th Cir. 1942); *Briggs v. California Employment Commission* (1946, Apr.) 28 A.C. 61; *Glen v. Beard* (6CCA) 141 Fed. 2d 376; *Texas v. Higgins* (2 CCA) 118 Fed. 2d 636; *Indian Refining Co. v. Dallman* (7 CAA) 119 F. 2d 417; *William v. U.S.* (7th CCA) 126 Fed. 2d 129; *U.S. v. Griswold* (1 CCA) 124 F. 2d 599; *Hirsch v. Rothensies* (D.C. Pa.) 56 F. Supp. 92; *Los Angeles Athletic Club v. U.S.* (D.C. Cal.) 54 F. Supp. 702; *Spillman v. Smith* (7th Cir.) 147 Fed. 2d 727; *Gulf Oil Corp. v. U.S.* 57 F. Supp. 376; *Nevin v. Rothensies* (D.C. Pa.) 58 F. Supp. 460; *Emard v. Squire* (D.C. Wash.) 58 F. Supp. 281. [27]

It may be, therefore, that ultimately the employee status in service relationships of doubtful nature will be made to depend on the absence of such a separate business or calling and on the presence of some degree of control over the manner and means of performance of the services. In fact, it seems reasonable to regard persons earning their

livelihood performing services for others, who have no established business or profession of their own and who are, in the performance of such services, subservient to the will of others, to be singularly subject to the hazards of unemployment and needy old age. On the other hand, those protected by capital reserve or equipped with the enterprising characteristics of a free agent, are more favorably endowed with what it takes to combat their own economic ills. A definitive limitation of the term "employment" along such lines, it seems to me, would more certainly fit into the commonly understood differentiation between persons employed by others and those self-employed, than that proposed by the Government. It also would be entirely consonant with traditional common-law precepts as they have been developed to meet a changing life picture. On the other hand, the extension of the term "employment" to the degree proposed by the Government and the inclusion not only of persons of doubtful status, but persons as well who have always been considered independent contractors,—in law and in practice,—on the basis that such persons are, as an economic fact, subject to the evils intended to be remedied, is more indicative of judicial legislation than of the interpretation of legislative intent. In any event it is not of immediate importance here what eventual outer boundaries are to be placed around the definition of the term employment. For here, the vendors were performing personal services constituting an integral part of the business operations of the employer, were not pursuing any separate trade business or pro-

fession involving capital outlay, the assumption of business risks, or the performance of like services to the public generally, and were subject to general control over the manner and means of performing their services. They were, therefore, employees within the statutory purport.

The decision of the Supreme Court in *National Labor Relations Board v. Hearst Publications*, *supra*, is not final judicial authority determining that the news vendors here are employees within the Social Security Statutes. The only positive holding in that case is that there was substantial evidence before the National Labor Relations Board to support the legal conclusion of that board establishing the employment relationship within the meaning of the National Labor Relations Act. Nevertheless, the decision here could fairly be made to rest on the results of the case before the Supreme Court. The facts in that case are not identical with those here presented, but their dissimilarity is not in material respects; the statute there interpreted is not the same as those here involved, but they are both of a kind. Although the Supreme Court did not uphold the findings of the National Labor Relations Act on the express basis that they were legally correct, its discourse admits of little doubt that the findings met with the Court's wholehearted approval*

*Although it has been said that the same persons might be employees for collective bargaining purposes and not employees within the Social Security laws (*Nevin, Inc. v. Rothensies*, *supra*) it hardly seems probable that Congress intended any such legal differentiation.

But because that case has the differences pointed out, the present case must be analyzed on its own facts, and the law applied thereto deduced from all competent legal precedents including those announced by the Supreme Court.

The publishers and vendors have, by their contract, attempted to establish a buyer-seller relationship between them. The contracts each recite such to be their intent. But the relationship of buyer and seller between them is entirely unrealistic. The publishers are not engaged in the wholesale business of selling newspapers to retailers, and the news vendors are not in any sense retail merchants [28] in the business of buying and selling merchandise. A newspaper is not, in fact, a commodity bought and sold as merchandise at all. It is the medium of disseminating information; it is the information which is sold and the publishers are the distributors and circulators of this information through the agency of their news vendors. Charging the vendors outright the "wholesale" price of papers delivered to them for sale, is referable more to an intent on the part of the publishers to impose a high degree of responsibility on the vendors for the care of the newspapers so delivered to them and for accuracy in accounting for the proceeds of the sales rather than to an intent to create a bona fide buyer-seller relationship. This is particularly so because as to papers returned unsold, the charge is offset by a corresponding credit. (See comment of Judge Denman in this regard in his dissenting opinion in the case of *Hearst Publications, Inc. v. National Labor*

Relations Board, 136 Fed. 2d 608, reversed, 322 U. S. 111.)

Even the California case of *New York Indemnity Company v. Industrial Accident Comm.* 213 Cal. 43, holding an injured news vendor to be beyond the coverage of the California Workmen's Compensation Act, admitted that news vendors were not independent contractors, but rather in the nature of sales agents.

Much emphasis is placed on the declared intent of the publishers and vendors to establish a buyer-seller relationship and not one of employer and employee. The plaintiffs point out that in the Restatement of the Law of Agency, one of the factors to be considered is "whether or not the parties believe they are creating the relationship of master and servant." But that belief must be a bona fide belief discernible from their actions and not based on declarations and the formality of contractual arrangements alone. (*Mateovich v. Anglim*, *supra*; also see *Pacific Lumber Co. v. Ind. Acc. Comm.* (1943) 22 Cal. 2d 410.) Here, nothing that was done functionally indicated a bona fide belief in the creation of a buyer-seller relationship. Furthermore the good faith of the parties' belief seems entirely irrelevant in this case. For it must be remembered that here the employment status of the vendors is important only to determine the applicability of the taxing provisions of the Social Security Statutes. Their applicability is not made to depend on the desires or beliefs of parties. Indeed, their efficacy would soon be impaired if such were the case. A

decision in favor of such status for that limited purpose does not infringe upon the parties' right of contract, or deny them the privilege of regarding themselves for any other purpose as buyer and sellers. But however they regard themselves and in whatever degree of good faith, they are nevertheless foreclosed from maintaining their status as buyers and sellers for the purpose of not being employers and employees within the Social Security Statutes if, within the meaning of those statutes the employment relationship is present. (*Griffith v. Commissioner*, 308 U.S. 355, 358).

The plaintiffs contend there is no employment relationship because "the vendor is free to sell his newspapers in the ways, methods and manner that he may see fit." (Opening statement of plaintiff's counsel.) That is, even regarding the vendor as an agent, the contention is made that he is nevertheless a free agent—responsible to his principal only for results. At common-law, such a person would not be considered an employee. (Restatement of the Law of Agency.) Whether or not this rule is eventually followed in interpreting the employment relationship in Social Security legislation is not of the moment.* Here there actually was at least a reasonable measure of general control exercised by the publisher over the manner in which the services of the vendors were performed. [29]

*In *Deecy Products Co. v. Welch*, *supra*, the court said: "... Congress does not intend a person to be considered an employee within the meaning of the Act unless he is subject to some sort of control and supervision."

*The publishers selected the vendors, designated their place, days and hours of service (within the limits agreed on by contracts) and fixed the profits they were to derive from the sale of each newspaper (although the profit, once fixed, remained constant for the period of the existing contract.) The vendors were expected to be at their corners at press release time, stay there for the sales period, be able to sell papers and take an interest in selling as many papers as they could. To see that they performed properly, they were kept under the surveillance of the publisher's employee, the "wholesaler." He was authorized to check in the vendor if the latter failed to so perform or to report any such infraction to the publisher, who could then discontinue further sales to the vendor, or report his conduct to the union for discipline by union agents. The vendor was required to sell his papers complete with sections in the order designated by the publisher and to display only newspapers on the stands or racks, which were furnished by the publishers at the latter's expense. The vendor incurred no expense or risks save that of having to pay for papers delivered him which by reason of loss or destruction he was unable to

*"A reasonable measure of direction and control over the method and means of performing the service is a constituent element of the relationship of master and servant, as distinguished from that of master and independent contractor, still the direction and control need not relate to every detail." *Jones v. Goodson*, 121 F. 2d 176.

return for credit. The vendors were not allowed to sell competitive newspapers without the publisher's consent. The plaintiff's seek to avoid the legal effect of these controls by explaining that they were not controls over the manner and means of performing the services at all (being that of selling newspapers) but merely the imposition of conditions of performance designed to effectuate the accomplishment of the desired results. It is claimed that in every independent contractual service relationship, such conditions are imposed to insure the success of the contract without transforming the relationship into one of employment. The plaintiffs thus invoke the principle that "where one is performing work in which another is interested the latter may exercise a certain measure of control for a definite and restricted purpose without acquiring the responsibilities of an employer." *Los Angeles Athletic Club v. U.S.* (D.C. Cal.) 54 F. Supp. 702, 706. This principle was followed in finding against an employment relationship with respect to newsboys in two California cases, *Bohanon v. James McClatchy-Publishing Co.* 16 Cal. App. 2d 188, and *New York Indemnity Co. v. Ind. Acc. Comm.* 213 Cal. 43. As to the former case, the employment relationship was there asserted to fix tort liability upon the publisher for the negligence of the newsboy. The court held that although the publisher did exercise some control over the activities of the newsboys, in other respects the latter had a free hand as to how he conducted his route and that in California "it is settled that the control which has

been adopted as the test by which the relationship between two persons is to be measured for the purpose of discovering whether such relationship is that of master and servant is complete and unqualified control." The rule of "complete control" announced in that case has not been followed even in California, in defining the employment relationship in remedial legislation. (Twentieth Century Lites, Inc. v. California Department of Employment, 28 A.C. 67, Apr. 1946; *Matcovich v. Anglim*, 134 F. 2d 834, 9th Cir.; *Grace v. Magruder*, 148 F. 2d 679.) In the case of *New York Indemnity Co. v. Ind. Acc. Comm.* supra, it is true that the court rejected the employment relationship within the meaning of the Workmen's Compensation Act in the case of a newsboy operating similarly to the news vendors here. It held that while the newsboy was not an independent contractor, he was nevertheless not an employee since there was lacking that degree of control over the manner and method of performing his duties by the publishers as would establish the employment relationship. Extensive analysis of that case for the purpose of distinguishing it from the present case is [30] unnecessary* for several reasons. First, federal courts are not bound by state court decisions in their interpretation of national Social Security legislation. (*National Labor Relations Board v. Hearst Publica-*

*For a discussion of the reasons for the reversal by the Cal. Sup. Ct. of its own decision, see note 32 Cal. Law Rev. No. 3, p. 289.

tions, *supra*.) Second, the decided federal cases indicate clearly a variance from the views there expressed, on the degree of control necessary to make out an employment relationship in remedial legislation. Third, the courts of California themselves have obviously drawn away from the tendency toward the restrictive and narrow application of common-law principles demonstrated by that case. (*Pacific Employers Insurance Company v. Ind. Acc. Comm.* 3 Cal. 2d 759; *Associated Indemnity Corp. v. Ind. Acc. Comm.* 128 C.A. 104 (1932). The rule is fairly well settled now that "employment" within the meaning of national remedial legislation, liberally construed, requires no more than a reasonable measure of control over the activities of the employee. What degree of control must be present depends upon the facts of each particular case.

Here, the vendors were subject to the publishers' control in every respect save the manner in which they personally offered the newspaper for sale to the public and collected the price. As to those features, lack of control is absent because of want of necessity for its presence. The witness, William Parrish, a news vendor, stated that in the sale of the newspapers, "it happens there is only one manner to do it." When the manner of performing the service is beyond another's control because of its nature, absence of direct control over such details becomes insignificant in the overall view of the facts and circumstances to be taken into account in determining the relationship. (*United States v. Vogue, Inc.* 145 F. 2d 609, *supra*.)

Here the news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers. In the performance of these services, they were subject to the general control of the publishers in every respect save where control was unimportant. In connection with their services they made no investment of capital, had no expenses and assumed no financial business risks, incidental to a separate trade, business or profession. They were, therefore, in employment with respect to which the taxes were properly imposed.

The plaintiffs stress certain pieces of evidence which they claim provide indicia of an independent-contractor relationship, namely, the lack of any right in the publishers to dismiss vendors without cause for the duration of the existing contract, the fact that the vendors provided their own transportation, filed no reports, attended no sales meetings, were not required to report to publishers' premises, have employed substitutes, and were privileged to and some actually sold non-competitive publications and other articles without the publishers' consent. These were at most details of this particular service relationship in operation. They did not alter the essential factors establishing, by their presence, the employment relationship, or change their character in context. (*National Labor Relations Board v. Hearst Publications, Inc.* 322 U.S. 111; *U.S. v. The Wholesale Oil Co. Inc.* 154 Fed. 2d 745; *Twentieth Century Lites Inc. v. Calif. Dept. of Employment*, 28 A.C. 67.) [31]

As to those selling other articles besides newspapers it does not appear that their relationship with the publishers was any different from other news vendors selling newspapers exclusively. The sale by them, therefore, of other articles did not, as to the newsvending, put them in the class of those performing such services incidental to the pursuit of a separately established business involving with respect to those services, capital investment and the assumption of substantial financial risk or the offering of similar services to the public at large.

Judgment will go for the defendant in all four cases upon findings of fact and conclusions of law to be presented in accordance with the rules.

Dated: December 31, 1946.

[Endorsed]: Filed Jan. 2, 1947.

[Title of District Court and Cause.]

DEFENDANT'S REQUEST FOR FINDINGS
OF FACT AND CONCLUSIONS OF LAW

The defendant respectfully requests the Court to enter the following findings of fact and conclusions of law attached hereto.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

By /s/ WILLIAM E. LICKING,

Assistant United States

Attorney.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. One of the plaintiffs (hereinafter called the publishers), Chronicle Publishing Company, a California corporation, is the owner and publisher of the San Francisco Chronicle (hereinafter called the Chronicle), a daily morning and Sunday newspaper sold in San Francisco, California, and the vicinity. The other plaintiff, Hearst Publications, Inc., a California corporation, is the owner and publisher of two daily newspapers, the San Francisco Examiner (hereinafter called the Examiner), a daily morning and Sunday paper, and the San Francisco Call-Bulletin, a daily evening *and Sunday* newspaper, sold in San Francisco, California, and the vicinity.

2. Upon notice and demand of the Collector of Internal Revenue, the publishers paid under protest the taxes due under Titles VIII and IX of the Social Security Act, the Federal Unemployment Tax Act measured by the earnings of the news vendors selling their newspapers after April 1, 1937, and through the year 1940. Thereafter, the publishers filed claims for refund and brought these suits for the recovery of the amounts so paid on the ground that the news vendors were not their employees.

3. During 1938, 1939 and 1940, the Examiner was published and sold in four editions daily, and the Chronicle in five editions daily. A substantial portion of the publisher's circulation is effected through street sales by news vendors.

4. For sales by street news vendors, the publishers divided the city into a number of districts. With respect to the Examiner, the city was divided during 1937 to 1940 in districts ranging from ten to twenty. In the case of the Chronicle, the city was divided into eleven districts. Each of the districts contains a number of sales locations, ranging from twelve to thirty. An employee of the publisher called a "wholesaler" is assigned to each district. The Examiner employs approximately forty such "wholesalers."

5. The chief function of the wholesalers was to deliver the newspapers to the vendors at each edition time, survey their particular district between editions to see if more papers were needed at a particular sales location, or if surplus newspapers should be transferred to another such location, to collect from the news vendors for the papers sold, receive the return of unsold papers and give credit therefore.

6. Prior to August 31, 1937, the vendors were engaged by the publishers for the sale of their newspapers at particular corners or sales locations, without written agreement between them.

7. After August 31, 1937, the publishers engaged news vendors to sell newspapers at particular sales locations under the terms of the written contracts

in force after that date between the news vendors' union and the publishers either by oral agreement or by written agreement such as the following:

The undersigned Publisher (Publishers) and News Vendor hereby agree that said News Vendor shall sell at a (Full) (Part) Time Corner as designated by the Publisher (Publishers) in accordance with the terms of the contract between the San Francisco Newspaper Publisher's Association and the News Vendors' Union No. 20769, American Federation of Labor, dated

.....
Publisher.

.....
News Vendor.

8. The relationship between the news vendors and the publishers prior to August 31, 1937, was akin to that established by the succeeding written contracts in force after that date between the news vendors' union and the publishers, except as hereinafter indicated and for the exercise of a greater degree of control by the publishers over the activities of the vendors in matters which were thereafter settled by the terms of the contracts.

9. The first written contract between the publishers and the news vendors' union was executed on August 31, 1937, between the San Francisco Newspaper Publisher's Association as the representative of the publishers, including the plaintiffs, and Newspaper and Periodical Vendors' and Dis-

tributors Union No. 468, a labor union chartered by the American Federation of Labor, representing the news vendors. Successively two other contracts were negotiated in 1939 and 1940 which were similar in terms to the first contract.

10. The facts pertinent to the relationship between the publishers and the news vendors as fixed by the aforesaid written contracts and as appearing from their actual operations during the period here involved are these:

11. In each of the union contracts there was contained a clause declaring to be the intent of the parties to maintain the relationship of seller and buyer between the publishers and the news vendors and not an employer-employee relationship. (The clause was inserted at the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment.)

12. Prior to 1939, persons wishing to sell newspapers would apply directly to the publishers for assignment to any vacant sales location. After 1939, the union contracts required that the vendors be selected by the publishers from a list of available vendors furnished on request by the union.

13. The street sales locations were characterized as full time corners, part time corners, special event corners, and special wrapped edition corners. There were also "bootjackers" or roving vendors selling papers at large. Such locations were designated, limited, changed, discontinued or reestablished entirely at the publishers' discretion and in order to coincide with the changing public demand.

14. Prior to August 31, 1937, the services of the vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location was entitled to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries, such as drunkenness and failure to appear for work, or for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If a vendor felt that his contract to sell at a particular location had been discontinued by the publisher without cause he could have the matter submitted to and determined by arbitration.

15. The publishers fixed the so-called "retail" price at which the newspapers were to be sold publicly as well as the so-called "wholesale" price which was the amount payable to the publishers for all newspapers delivered to the news vendors which were not returned as unsold. Once fixed, such prices remained constant for the duration of the union contract then in force. The difference between the "wholesale" and "retail" price was the vendor's so-called "profit" or earnings. In addition, the news vendor was guaranteed a minimum weekly "profit."

16. The news vendor makes no payment for the newspapers at the time they are delivered to him for sale. He accounts for all the newspapers delivered either at the end of each edition or near the end of each day's sales period. At that time

he "checks in" or pays to the wholesaler the so-called "wholesale" price for the newspapers delivered to him which he does not return, receives full credit for all unsold newspapers which are returned, and keeps the difference between the amount paid and the amount received as his earnings.

17. Within certain limits prescribed by the union contracts, the publisher fixed for the various types of corners, the days and hours of sale which the publishers established to coincide with the news releases, the public's reading habits and its concentration at particular locations at particular periods.

18. As each edition left the press, the newspapers were delivered to the vendors at their corners by the wholesalers. The quantity delivered did not rest in the vendor's discretion but depended on what it was estimated the vendor, during the selling period, could dispose of at his location. Any disagreement as to the number of papers the vendor should take appeared to be a matter for settlement between the publisher and the union.

19. In their sales to the public, the vendors were required to sell complete newspapers only in such order as was designated by the publishers, and were not allowed to sell competitive newspapers without the publishers' consent. They were free to offer the papers for sale in the manner they saw fit, except that they were expected to be at their corners at press release time, to stay there during the sales period, to be able to sell papers and take an interest in selling them.

20. The manner in which the news vendors individually could offer the newspapers for sales to the public was so limited and of such nature as not to need control.

21. Prior to August 31, 1937, the wholesaler gave orders to the vendors in matters connected with the performance of their duties and disciplined them for failure to comply. Thereafter, the wholesalers kept the news vendors under their surveillance to see that they performed properly, observed their conduct, made suggestions and reported misfeasances to the publishers. In cases of misconduct of vendors warranting dismissal, the wholesaler could "check in" vendors before the end of the day's selling period or report the misfeasance to the publisher, who could then discontinue further deliveries to the vendor involved or report his conduct to the union agents for any disciplining short of discontinuance of deliveries to him.

22. The vendors had no expenses to bear and assumed no risks except the risk of the loss of papers delivered to them for sale and charged against them. They provided their own transportation to and from sales locations.

23. The vendors were not required to submit any form of report. There were no conferences or sales meetings which they were obliged to attend, nor was it necessary that they report to the publishers' premises for any purpose.

24. All advertising placards and display stands or racks were provided by the publishers and bore

the publisher's name. The vendors were forbidden to place anything on such stands or racks except newspapers.

25. The news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers.

26. The services performed by the news vendors were not incident to the pursuit of a separately established trade, business or profession of the news vendors, involving in their performance capital investment and the assumption of financial risk, or the offering of similar services to the public at large.

27. The services performed by the news vendors were subject to a reasonable measure of general control by the publishers over the manner and means of their performance.

Conclusions of Law

1. The services performed by the news vendors were performed in the "employment" of the plaintiffs within Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, and the Federal Unemployment Tax Act.

2. The defendant is entitled to judgment dismissing the plaintiffs' complaint.

District Judge.

[Endorsed]: Lodged 1/28/47.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, subject to the approval of the Court, that plaintiffs may have to and including the 17th day of February, 1947, within which to propose objections and or amendments to proposed Findings of Fact lodged by the defendant in the above entitled action.

Dated: San Francisco, California, February 7, 1947.

/s/ GROVE J. FINK,
Attorney for Plaintiffs,

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant United States
Attorney.

So Ordered:

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Feb. 7, 1947.

[Title of District Court and Cause.]

PLAINTIFFS' OBJECTIONS AND SUGGESTION FOR AMENDMENTS AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs respectfully request the Court to consider the following objections and amendments and additions to Findings of Fact and Conclusions of Law on file herein:

Finding No. 1. Delete the words "and Sunday newspaper" page 1, line 25.

Finding No. 2. After the word "and" page 1, line 27, insert the words "the arbitrary." In line 28 after the word "taxes" insert the words "alleged to be."

Finding No. 9. Page 3 at line 23 insert a new sentence to read as follows:

"Thereafter two other contracts were negotiated in 1942 and 1944 and were likewise similar in terms to the first contract."

Finding No. 11. Strike out the entire sentence beginning with the words "the clause," page 4, line 1, and ending with the word "betterment" and in lieu thereof insert the following:

"The clause was suggested by the publishers and after consideration and negotiation the vendors agreed thereto."

Finding No. 12. On line 4, page 4, correct the date "1939" to read "1937" and correct the date "1939" page 4, line 6, to read "1937."

Delete the word "Union" on page 4, line 6.

Finding No. 13. Delete the word "characterized", page 4, line 9, and insert in lieu thereof the words "defined in the contracts."

Delete the word "entirely," page 4, line 13.

Delete the clause beginning with the word "and" and ending with the word "demand" in line 15, page 4.

Finding No. 15. Delete the word "publishers" page 4, line 28, and insert in lieu thereof the word "contracts."

Delete the word "so-called" in line 28 and in line 30 on page 4, and in line 4 on page 5.

Delete the word "union" page 5, line 2.

After the word "guaranteed," page 5, line 5, insert the words "under the terms of the contract."

Finding No. 16. Page 5, line 6, introduce the finding by a sentence to read as follows:

"The method of payment by the newspaper vendor for the papers delivered to him is provided for by the contract and is as generally hereinafter described."

Delete the words "so-called," page 5, line 10.

Finding No. 17. Delete the word "certain," page 5, line 15, and insert the word "the".

Delete the word "union", page 5, line 15.

Finding No. 18. Delete the words "did not rest", page 5, line 22, and insert in lieu thereof the word "rested".

Delete the word "but", page 5, line 22, and insert in lieu thereof the word "and".

Delete the words "it was estimated", page 5, line 23, and after the word "vendedor", page 5, line 23, insert the words "estimated he could sell".

After the word "period", page 5, line 24, delete the words "could dispose of".

Delete the entire sentence beginning with the word "any", page 5, line 24, and ending with the word "union" page 5, line 26.

Finding No. 19. After the word "public", page 5, line 27, insert the words "the contract provided that".

Delete the word "required", page 5, line 28.

Finding No. 20. Delete the entire finding beginning with the word "The" page 6, line 4, and ending with the word "control", page 6, line 5.

Finding No. 21. Delete the words "warranting dismissal", page 6, line 13, and insert in lieu thereof the following: "amounting to breach of the contract".

Finding No. 22. Delete the words beginning with the word "no", page 6, line 18, and ending with the word "except" page 6, line 19.

Delete the period following the word "then", page 6, line 20, and insert the words "and all losses by reason of their credit selling of newspapers."

Finding No. 24. Delete the word "all" page 6, line 26, [44] and insert the word "such".

Delete the word "forbidden" page 6, line 28, and insert the words "requested not".

Finding No. 25. Delete the entire finding page 7, lines one to three, inclusive, and in lieu thereof insert a new finding to read as follows:

“The news vendors were engaged as a means of livelihood in selling at their various locations single copies of newspapers to the public at the retail price fixed by the contract which said newspapers they purchased from the publisher at the wholesale price fixed by the contract.”

Finding No. 26. Delete the entire finding as proposed, page 7, lines 4 to 9, inclusive, and insert in lieu thereof the following:

“The activities performed by the news vendors constituted incidents of a separately established trade or business of the news vendors involving in their performance capital investment and the assumption of financial risk, which said activities were offered and available to and utilized by the publishers of other publications and the producers and distributors of various and sundry articles.”

Finding No. 27. Delete the entire finding beginning with the word “the”, page 7, line 10, and ending with the word “performance”, page 7, line 12, and insert in lieu thereof the following:

“The activities of the news vendors were subject to control by the publishers only as provided in the contract.”

Add a new finding to be numbered Finding 28 to read as follows:

“The publishers make no retail sales of newspapers whatsoever and make no delivery of single copies to the public other than through mail subscriptions. Newspapers are sold by the publishers to the news vendors and various other sales outlets at a wholesale rate or price per hundred copies.” [45]

Add a new finding to be numbered Finding 29 to read as follows:

“The news vendors are free to and do sell publications other than the newspapers published by the publishers and are free to and do sell other articles.”

Dated: San Francisco, California, February 17, 1947.

FINK & KEYSTON,
By GROVE J. FINK.

Receipt of a copy of the foregoing Plaintiffs Objections and Suggestions for Amendments and Additions to Findings of Fact and Conclusions of Law is hereby acknowledged this 17th day of February, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant United States
Attorney.

[Endorsed]: Filed Feb. 18. 1947. [46]

[Title of District Court and Cause.]

ORDER SETTLING FINDINGS OF FACT
AND CONCLUSIONS OF LAW

It is Ordered, that defendant's proposed Findings of Fact and Conclusions of Law are adopted subject to the following modifications, amendments and additions:

(1) From Finding No. 1, at page 1, line 25, delete [47] the words "and Sunday."

(2) To finding No. 9, at the end thereof, add the following sentence:

"Thereafter two other contracts were negotiated in 1942 and 1944 and were likewise similar in terms to the first contract."

(3) From finding No. 13, delete the word "characterized" page 4, line 9, and insert in lieu thereof the words "defined in the contracts."

(4) To finding No. 15, after the word "guaranteed," page 5, line 5, insert the words "under the terms of the contract."

(5) From finding No. 17, delete the word "certain," page 5, line 15, and insert in lieu thereof the word "the."

(6) From finding No. 22, delete the period following the word "them" page 6, line 20, and insert the words "and all losses by reason of their credit selling of newspapers, if any."

(7) Amend finding No. 26 to read as follows:

“The vendors were not prohibited from selling non-competitive publications and articles of personal property, and some so did. Nevertheless, as to the services performed by the news vendors for the publishers, the same were not incident to the pursuit of a separately established trade, business or profession of the news vendors, involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar service to the public at large.”

Let the findings be engrossed accordingly.

Dated: February 26, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Feb. 27, 1947. [48]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. One of the plaintiffs (hereinafter called the publishers), Chronicle Publishing Company, a California corporation, is the owner and publisher of the San Francisco Chronicle (hereinafter called the Chronicle), a daily morning and Sunday newspaper sold in San Francisco, California, and the

vicinity. The other plaintiff, Hearst Publications, Inc., a California corporation, is the owner and publisher of two daily newspapers, the San Francisco Examiner (hereinafter called the Examiner), a daily morning and Sunday paper, and the San Francisco Call-Bulletin, a daily evening newspaper, sold in San Francisco, California, and the vicinity.

2. Upon notice and demand of the Collector of Internal Revenue, the publishers paid under protest the taxes due under Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, the Federal Unemployment Tax Act measured by the earnings of the news vendors selling their newspapers after April 1, 1937, and through the year 1940. Thereafter, the publishers filed claims for refund and brought these suits for the recovery of the amounts so paid on the ground that the news vendors were not their employees.

3. During 1938, 1939 and 1940, the Examiner was published and sold in four editions daily, and the Chronicle in five editions daily. A substantial portion of the publisher's circulation is effected through street sales by news vendors.

4. For sales by street news vendors, the publishers divided the city into a number of districts. With respect to the Examiner, the city was divided during 1937 to 1940 in districts ranging from ten to twenty. In the case of the Chronicle, the city was divided into eleven districts. Each of the districts contains a number of sales locations, ranging

from twelve to thirty. An employee of the publisher called a "wholesaler" is assigned to each district. The Examiner employs approximately forty such "wholesalers."

5. The chief function of the wholesalers was to deliver the newspapers to the vendors at each edition time, survey their particular district between editions to see if more papers were needed at a particular sales location, or if surplus newspapers should be transferred to another such location, to collect from the news vendors for the papers sold, receive the return of unsold papers and give credit therefore.

6. Prior to August 31, 1937, the vendors were engaged by the publishers for the sale of their newspapers at particular corners or sales locations, without written agreement between them.

7. After August 31, 1937, the publishers engaged news vendors to sell newspapers at particular sales locations under the terms of the written contracts in force after that date between the news vendors' union and the publishers either by oral agreement or by written agreement such as the following:

The undersigned Publisher (Publishers) and News Vendor hereby agree that said News Vendor shall sell at a (Full) (Part) Time Corner as designated by the Publisher (Publishers) in accordance with the terms of the contract between the San Francisco Newspaper Publisher's Association and

the News Vendors' Union No. 20769, American Federation of Labor, dated

.....
Publisher.

.....
News Vendor.

8. The relationship between the news vendors and the publishers prior to August 31, 1937, was akin to that established by the succeeding written contracts in force after that date between the news vendors' union and the publishers, except as hereinafter indicated and for the exercise of a greater degree of control by the publishers over the activities of the vendors in matters which were thereafter settled by the terms of the contracts.

9. The first written contract between the publishers and the news vendors' union was executed on August 31, 1937, between the San Francisco Newspaper Publisher's Association as the representative of the publishers, including the plaintiffs, and Newspaper and Periodical Vendors' and Distributors' Union No. 468, a labor union chartered by the American Federation of Labor, representing the news vendors. Successively two other contracts were negotiated in 1939 and 1940 which were similar in terms to the first contract. Thereafter two other contracts were negotiated in 1942 and 1944 and were likewise similar in terms to the first contract.

10. The facts pertinent to the relationship between the publishers and the news vendors as fixed by the aforesaid written contracts and as appear-

ing from their actual operations during the period here involved are these:

11. In each of the union contracts there was contained a clause declaring to be the intent of the parties to maintain the relationship of seller and buyer between the publishers and the news vendors and not an employer-employee relationship. The clause was inserted at the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment.

12. Prior to 1939, persons wishing to sell newspapers would apply directly to the publishers for assignment to any vacant sales location. After 1939, the union contracts required that the vendors be selected by the publishers from a list of available vendors furnished on request by the union.

13. The street sales locations were defined in the contracts as full time corners, part time corners, special event corners, and special wrapped edition corners. There were also "bootjackers" or roving vendors selling papers at large. Such locations were designated, limited, changed, discontinued or re-established entirely at the publishers' direction and in order to coincide with the changing public demand.

14. Prior to August 31, 1937, the services of the vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location was entitled to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries, such as drunkenness and failure to appear for work, or

for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If a vendor felt that his contract to sell at a particular location had been discontinued by the publisher without cause he could have the matter submitted to and determined by arbitration.

15. The publishers fixed the so-called "retail" price at which the newspapers were to be sold publicly as well as the so-called "wholesale" price which was the amount payable to the publishers for all newspapers delivered to the news vendors which were not returned as unsold. Once fixed, such prices remained constant for the duration of the union contract then in force. The difference between the "wholesale" and "retail" price was the vendor's so-called "profit" or earnings. In addition, the news vendor was guaranteed under the terms of the contract a minimum weekly "profit."

16. The news vendor makes no payment for the newspapers at the time they are delivered to him for sale. He accounts for all the newspapers delivered either at the end of each edition or near the end of each day's period. At that time he "checks in" or pays to the wholesaler the so-called "wholesale" price for the newspapers delivered to him which he does not return, receives full credit for all unsold newspapers which are returned, and keeps the difference between the amount paid and the amount received as his earnings.

17. Within the limits prescribed by the union contracts, the publishers fixed for the various

types of corners, the days and hours of sale which the publishers established to coincide with the news releases, the public's reading habits and its concentration at particular locations at particular periods.

18. As each edition left the press, the newspapers were delivered to the vendors at their corners by the wholesalers. The quantity delivered did not rest in the vendor's discretion but depended on what it was estimated the vendor, during the selling period, could dispose of at his location. Any disagreement as to the number of papers the vendor should take appeared to be a matter for settlement between the publisher and the union.

19. In their sales to the public, the vendors were required to sell complete newspapers only in such order as was designated by the publishers, and were not allowed to sell competitive newspapers without the publishers' consent. They were free to offer the papers for sale in the manner they saw fit, except that they were expected to be at their corners at press release time, to stay there during the sales period, to be able to sell papers and take an interest in selling them.

20. The manner in which the news vendors individually could offer the newspapers for sales to the public was so limited and of such nature as not to need control.

21. Prior to August 31, 1937, the wholesaler gave orders to the vendors in matters connected with the performance of their duties and disciplined them for failure to comply. Thereafter, the

wholesalers kept the news vendors under their surveillance to see that they performed properly, observed their conduct, made suggestions and reported misfeasances to the publishers. In cases of misconduct of vendors warranting dismissal, the wholesaler could "check in" vendors before the end of the day's selling period or report the misfeasance to the publisher, who could then discontinue further deliveries to the vendor involved or report his conduct to the union agents for any disciplining short of discontinuance of deliveries to him.

22. The vendors had no expenses to bear and assumed no risks except the risk of the loss of papers delivered to them for sale and charged against them and all losses by reason of their credit selling of newspapers, if any. They provided their own transportation to and from sales locations.

23. The vendors were not required to submit any form of report. There were no conferences or sales meetings which they were obliged to attend, nor was it necessary that they report to the publishers' premises for any purpose.

24. All advertising placards and display stands or racks were provided by the publishers and bore the publisher's name. The vendors were forbidden to place anything on such stands or racks except newspapers.

25. The news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers.

26. The vendors were not prohibited from selling non-competitive publications and articles of

personal property, and some so did. Nevertheless, as to the services performed by the news vendors for the publishers, the same were not incident to the pursuit of a separately established trade, business or profession of the news vendors, involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large.

27. The services performed by the news vendors were subject to a reasonable measure of general control by the publishers over the manner and means of their performance.

Conclusions of Law

1. The services performed by the news vendors were performed in the "employment" of the plaintiffs within Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, and the Federal Unemployment Tax Act.

2. The defendant is entitled to judgment dismissing the plaintiffs' complaint.

LOUIS E. GOODMAN,

United States District Judge.

The above findings submitted following the Court's order of February 26, 1947.

/s/ FRANK J. HENNESSY,

United States Attorney.

By W. E. LICKING,

Asst. U. S. Atty.

Dated April 28th, 1947.

[Endersd]: Filed April 29, 1947. [56]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25228-G

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause coming on for trial, both parties appearing by counsel, and having been submitted to the court for trial without a jury and the court now here after hearing all the evidence adduced and being fully advised in the premises, and having made its findings of fact and conclusions of law, finds the issues for the defendant.

Therefore, it is hereby ordered, adjudged and decreed that the plaintiff take nothing; that the action be and it is hereby dismissed on the merits; that the defendant have and recover from the plaintiff its costs in the action. and that the defendant have execution therefor.

Dated April 28th, 1947.

LOUIS E. GOODMAN,
District Judge.

[Endorsed]: Lodged 2/17/47. Filed and entered
April 29, 1947. [57]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Tuesday, the 29th day of April, in the year of
our Lord one thousand nine hundred and forty-
seven.

Present: The Honorable Louis E. Goodman,
District Judge.

Civ. No. 25230-G, The Chronicle Publishing Co.,
etc., vs. United States;

Civ. No. 25231-G, The Chronicle Publishing Co.,
etc., vs. United States;

Civ. No. 25228-G, Hearst Publications, Inc., etc.,
vs. United States;

Civ. No. 25229-G, Hearst Publications, Inc., etc.,
vs. United States.

Minute Order April 29, 1947

ORDER THAT ENGROSSED FINDINGS AND
JUDGMENTS BE FILED AND ENTERED

These cases heretofore having been tried before
the Court sitting without a jury, and the Court
having found in favor of the defendant upon find-
ings of fact and conclusions of law and the defend-
ant having submitted proposed findings and the
plaintiffs having submitted proposed amendments
thereto, and the Court thereafter having ordered

the proposed findings submitted by the defendant engrossed, and the proposed findings thereafter having been engrossed, it is Ordered that said engrossed findings and the judgments herein be filed and entered in the form presented and signed. [58]

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 25228-G

HEARST PUBLICATIONS, INCORPORATED, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR LEAVE TO ENTER APPEAR-
ANCE OF ADDITIONAL ATTORNEYS
FOR PLAINTIFF

Plaintiff moves the court to enter an order permitting Reginald H. Linforth and James I. Johnson to file their appearance as additional attorneys for the plaintiff.

GROVE J. FINK,

FINK & KEYSTON,

By /s/ GROVE J. FINK,

Attorneys for Plaintiff.

Consent to Entry of Order

Consent is hereby given to the entry of the order requested in the foregoing motion, without notice,

Dated July 11, 1947.

/s/ FRANK J. HENNESSY,

Attorney for Defendant.

By C. ELMER COLLETT,

Asst. U. S. Attorney.

[Endorsed]: Filed July 14, 1947. [59]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO ENTER
APPEARANCES

On motion of plaintiff, and pursuant to the consent of defendant, leave is hereby granted Reginald H. Linforth and James I. Johnson to file their respective appearances in the above entitled action as additional attorneys for plaintiff therein.

Dated July 14, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed July 14, 1947. [60]

[Title of District Court and Cause.]

APPEARANCES

The undersigned, Reginald H. Linforth and James I. Johnson, in pursuance of an order of the above entitled court, granting them leave so to do, hereby enter their respective appearances as additional attorneys for plaintiff in the above entitled action.

Dated July 14, 1947.

/s/ REGINALD H. LINFORTH,
910 Crocker Building,
San Francisco, California,
Sutter 4815.

/s/ JAMES I. JOHNSON,
910 Crocker Building,
San Francisco, California,
Sutter 4815.

[Endorsed]: Filed July 14, 1947. [61]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Hearst Publications, Incorporated, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947.

GROVE J. FINK,
FINK & KEYSTON,

By GROVE J.FINK.

REGINALD H. LINFORTH,
JAMES I. JOHNSON,

Attorneys for appellant
Hearst Publications,
Incorporated.

Of Counsel:

CALKINS, HALL, LINFORTH &
CONARD.

[Endorsed]: Filed July 21, 1947. [62]

[Title of District Court and Cause.]

COST BOND ON APPEAL

The premium on this bond is \$10 per annum.

Whereas, the plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment entered against it in said action in the District Court of the United States, for the Northern District of California, Southern Division, in favor of the defendant in said action, on the 29th day of April, 1947.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal on on a [63] dismissal thereof not exceeding the sum of \$250.00, to which amount it acknowledges itself bound.

In Witness Whereof the corporate seal and name of the said surety company is hereto affixed and attested at San Francisco, California, by its duly authorized officer this 18th day of July, 1947.

In case of a breach of any condition hereof the above entitled court may, upon notice to said Maryland Casualty Company, surety hereunder, of not less than ten days, proceed summarily in the above

entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment against said surety and award execution therefor.

[Seal] MARYLAND CASUALTY
COMPANY,

By /s/ H. M. VREELAND, JR.,
Attorney in Fact.

[Endorsed]: Filed July 21, 1947. [64]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF THE
TIME FOR FILING THE RECORD ON
APPEAL AND DOCKETING THE ACTION

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys of record:

That an order may be entered extending the time for filing the record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff.

. Dated August 20, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

Attorney for Defendant.

[Endorsed]: Filed Aug. 21, 1947. [65]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE THE
RECORD ON APPEAL AND DOCKET
THE ACTION ON APPEAL

Pursuant to the stipulation of the parties hereto, it is hereby ordered that the time for filing the record on appeal and docketing the action on the appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 29, 1947, notice of which appeal has been filed by plaintiff, be, and the same hereby is, extended to and including October 18, 1947.

Dated August 21st, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug. 21, 1947. [66]

[Title of District Court and Cause.]

WITHDRAWAL OF ATTORNEYS

Whereas, Grove J. Fink, of the firm of Fink & Keyston, died on the 23rd day of July, 1947, said firm, with the consent of plaintiff appended hereto, hereby withdraws as attorneys for plaintiff in the above entitled action.

Dated August 19, 1947.

FINK & KEYSTON,
By /s/ GARTON D. KEYSTON.

Consent to Withdrawal

Hearst Publications, Incorporated, hereby consents to the withdrawal of Fink & Keyston as its attorneys in the above entitled action, leaving Reginald H. Linforth and James I. Johnson as its sole attorneys in said action.

Dated August 19, 1947.

HEARST PUBLICATIONS,
INCORPORATED,
By /s/ CLARENCE LINDNER.

[Endorsed]: Filed Aug. 21, 1947. [67]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO WITHDRAW
AS ATTORNEYS

Pursuant to the consent of plaintiff filed herein, leave is hereby given to Messrs. Fink & Keyston to withdraw as attorneys for the plaintiff in the above entitled action.

Dated August 21st, 1947.

LOUIS E. GOODMAN,
U. S. District Judge.

Consent is hereby given to the granting of the foregoing order without notice.

/s/ FRANK J. HENNESSY,
Attorney for Defendant.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 21, 1947. [68]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLANT INTENDS TO
RELY UPON APPEAL

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news vendors involved were employees of plaintiff and were not independent contractors.

2. The court erred in the findings of fact upon which its decision was based.

3. The court erred in its conclusions of law.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Appellant.

Received a true copy of the foregoing this 24th day of September, 1947.

WILLIAM E. LICKING,

Asst. U. S. Atty.,

Attorney for Appellee.

[Endorsed]: Filed Sept. 24, 1947. [69]

[Title of District Court and Cause.]

STIPULATION AS TO THE RECORD
ON APPEAL

It is hereby stipulated by and between the parties hereto, through their respective attorneys of record:

1. That the following are designated as the parts of the record, proceedings and evidence to be included in the record on appeal:

(a) The complaint.

(b) The summons.

(c) The answer to the complaint.

(d) Order relative to consolidation and setting case for trial on March 28, 1946, entered January 28, 1946.

(e) Motion for judgment on pleadings filed March 22, 1946.

(f) Order consolidating for trial cases Nos. 25228, 25229, 25230, and 25231, entered March 28, 1946. [70]

(g) Motion for judgment, filed April 2, 1946.

(h) A complete transcript of all the evidence and proceedings.

(i) All exhibits identified, offered or introduced in evidence, being plaintiff's Exhibits Nos. 1 through 53, both inclusive, and Defendant's Exhibits A through Z, both inclusive, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ.

(j) Order submitting case, entered July 29, 1946.

(k) Order that judgment be for defendant upon findings to be presented, entered January 2, 1947.

(l) Opinion, filed January 2, 1947.

(m) Defendant's request for findings, filed January 28, 1947.

(n) Stipulation extending time to file objections, amendments and additions to findings, filed February 7, 1947.

(o) Plaintiff's objections and suggestions for amendments and additions to findings, filed February 18, 1947.

(p) Order settling findings of fact and conclusions of law, filed February 27, 1947.

(q) Findings, filed April 29, 1947.

(r) Judgment, filed April 29, 1947, together with order that findings and judgment be entered and filed, entered April 29, 1947.

(s) Motion relative to appearances, filed July 14, 1947.

(t) Order permitting additional appearances, filed July 14, 1947.

(u) Appearance of Reginald H. Linforth and James I. Johnson, filed July 14, 1947.

(v) Notice of Appeal, filed July 21, 1947.

(w) Cost of Bond on Appeal, filed July 21, 1947.

(x) Withdrawal of Attorneys, filed August 21, 1947.

(y) Order Granting Leave to Fink & Keyston to Withdraw as Attorneys, filed August 21, 1947.

(z) Stipulation, filed August 21, 1947.

(aa) Order Extending Time to File Record on Appeal and Docket the Action, filed August 21, 1947. [71]

(bb) Statement of Points on which Appellant Intends to Rely Upon Appeal.

(cc) This Stipulation as to the Record on Appeal.

2. That the original exhibits may be sent up to the Circuit Court of Appeals as a part of the record. instead of copies thereof.

3. That the certified copy of the transcript of the evidence and proceedings, filed with the Clerk of the United States District Court in the above case, shall be transmitted as a part of the record on appeal, and that additional copies thereof need not be filed by appellant.

Dated September 18, 1947.

/s/ REGINALD H. LINFORTH,

/s/ JAMES I. JOHNSON,

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY.

U. S. Attorney,

/s/ W. E. LICKING,

Asst. U. S. Atty.,

Attorney for Defendant.

[Endorsed]: Filed Sept. 24, 1947. [72]

[Title of District Court and Cause.]

ORDER ENLARGING THE TIME IN WHICH
TO FILE THE RECORD ON APPEAL

On motion of appellant, and for good cause shown, the time in which the appellant may file the record on appeal and docket the section on appeal in the above-entitled case, numbered 25228-G in the District Court of the United States for the Northern District of California, Southern Division, is hereby extended to and including November 18, 1947.

Dated this 16th day of October, 1947.

WILLIAM DENMAN,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

A true copy. Attest: Oct. 16, 1947.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Oct. 16, 1947. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Oct. 17, 1947. C. W. Calbreath, Clerk. [73]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 73 pages, numbered from 1 to 73, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Hearst Publications, Incorporated, a corporation, Plaintiff, vs. United States of America, Defendant, No. 25228-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$10.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of November, A. D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk. [74]

In the United States District Court, for the
Northern District of California, Southern
Division

Nos. 25228-9

HEARST PUBLICATIONS, INCORPORATED, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Nos. 25230-1

THE CHRONICLE PUBLISHING COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

Consolidated

Appearances:

For the Plaintiffs, Grove J. Fink, Esquire.

For the Defendants, Arthur L. Jacobs, Esquire,
Special Assistant to the Attorney General of the
United States, and William Licking, Esquire, As-
sistant United States Attorney.

Amicus Curiae, S. A. Ladar, appearing on behalf
of Newspaper and Periodical Vendors Union.

Clarence A. Linn, Esquire, appearing on behalf of
the Attorney General of the State of California. [1*]

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

The Court: Do you wish to make an opening statement?

Mr. Fink: Yes, your Honor, I desire to. I desire to take a recess first.

The Court: Would you prefer that?

Mr. Fink: I would prefer that.

(Recess.)

Mr. Fink: May it please the Court, you have already been advised as to the statutes under which the complaints of the causes have arisen. The complaints, I want to assure the Court, are not quite so formidable as they appear, because attached to the complaints are numerous exhibits, each and every one of which is admitted to be a true copy, and there is no controversy as to them.

The Federal Insurance Contributions Act complaint of the Hearst Publications, Inc., contains nine counts and covers periods beginning with April 1st, 1937, covering the period of time until December 31, 1940. Those respective counts were necessary because under the Act the newspapers, The Examiner and The San Francisco Call-Bulletin, are assessed quarterly. Under the Unemployment Insurance Tax Act, or the Unemployment Tax Act, the Hearst Publications' complaints contain but three counts and covers a period beginning with January 1st, 1937, for the entire year of 1938 and the calendar year 1940, there being no assessment for the year 1939.

The Chronicle's complaints are identical with the Hearst [2] Publications' complaints, both in contents and in number of counts.

The allegations of the complaints are largely admitted. The corporate existence of the respective plaintiffs, the publication, the statutes, the circulation and retail sales on the streets of San Francisco of the various newspapers is admitted; the type of action, the issuance of assessments and notices by the collectors, the demand for payment of tax, the payment of tax under protest and with appropriate claim for refund, the disallowance of the claims in accordance with the Internal Revenue Bureau procedure and such is admitted; and, notably, the contract to which reference has been made, which is attached as Exhibit 4, is admitted as a true copy.

The contract is one between the San Francisco Newspaper Publishers Association, and the News Vendors Union in San Francisco.

Now, the answer denies all the following allegations. We assert in our complaint a definition of the term "News Vendors" which they deny. It is denied that papers are purchased at wholesale and sold at retail on the streets of San Francisco and that the profit to the news vendors is the difference between the wholesale and retail price. The organization of the news vendors and the negotiations and execution of the contract of August 31, 1937, is denied, as is the intent to establish a buyer and seller, independent contractor relationship. [3] They deny that construction of the contract. We have pleaded in the complaints, if your Honor please, four subsequent contracts which were executed in 1939, 1940, 1942 and 1944, between the same per-

sons, the same parties. That denial, I understand, is merely a formal denial, because that paragraph contains some other allegations.

I understand there is an admission that the four contracts were signed and that the copies which will be introduced are true copies. However, they do deny, for technical reasons I suppose, those four subsequent contracts. The intent of the parties in the four subsequent contracts is denied. By that denial, they deny that the intent in the four subsequent contracts was to establish a buyer-seller independent contract relationship. They deny that the street vendors are not employees. They deny that they are independent contractors, and they deny that the plaintiff exercises no control over the vendors or that the plaintiff has no right to control. They make formal denials in connection with the payment of the tax, the liability for the tax.

Now, the pleadings, if your Honor please, as thus very briefly described, present a clean-cut and clear-cut issue. There is only one issue in the case, that is, the status of the news vendors who sell newspapers on the streets of San Francisco. It is the contention of the plaintiff, and we will prove, that these vendors have operated under the system under which they are now operating, long before the enactment of the Social Security Act and the Unemployment Insurance Act, and always have been buyers of newspapers at wholesale rates and that they have always sold those newspapers upon the streets of San Francisco at a retail rate. The relationship as between the parties prior to and after the enact-

ment of the Federal statute has been that of buyer-seller and that the news vendors are, in fact, independent contractors. We contend, of course, that there is no liability for the tax; that it has been paid and having been paid and appropriate claims for refund having been filed and disallowed, that the Government should make the refunds.

Of course newspapers are distributed by a contract system, if it please the Court, but we are concerned only and solely with the one type of newspaper distribution in this case, and that is the distribution by the street corner vendors who sell you your paper at night when you start for your train or home, or in the morning on your way to work. We will show that in 1937 the vendors, for reasons of their own with which I am not concerned, formed an organization and affiliated with the American Federation of Labor and thereafter approached the publishers of San Francisco, seeking a contract with the publishers for the sale on the streets of San Francisco of the newspapers purchased by members of their organization. We will show that the publishers agreed to negotiate with the Vendors' [5] Union and those negotiations opened in the month of June, early in the month of June 1937. We will show that at the very opening, the very beginning of those negotiations, the question as to the status of the Vendors' Union and the individual arose and that as a result of that question arising that early, it was decided by both parties that the negotiations would proceed upon only one basis, to wit, that of the continuation of the

buyer-seller relationship. It will appear as the evidence in the case progresses that the intent of the parties in opening negotiations in 1937 was expressed in a paragraph of the contract, Paragraph I, which declared it to be the intent of both parties to establish the buyer-seller, independent contractor relationship, and contained another provision that the parties would not construe any part of the contract as being anything else; and it will be shown that that particular provision of the contract, Section 1, was carried through, not only in the first but the four succeeding contracts, making five contracts in all, arms-length negotiation in which the intent of the parties was expressed. I might say, parenthetically, that I recognize as well as anybody else that as a matter of law you cannot, by declaration, make a document something it is not. But I do say to the Court that when the parties have, through five successive contracts, expressed their intent, that weight must be given to that expression of intent. We will cover the matter of the construction of the contract, the 1937 contract, by the parties and will show to the Court that the parties in their dealings with each other construed and intended that contract directly in accordance with the expressed intent. The course of the testimony will show that newspapers, in these particular methods of distribution, are delivered to the vendors by individual employees of the publishers, who are called "Wholesalers." These wholesalers distribute from the publishers' plants as rapidly as possible to the individual vendors, the several editions of the paper,

and the evidence will show that the individual vendor is given such number of papers as he, the vendor, may order. At that point, the evidence will show that the contract of the publisher with the vendor ceases until it comes time for the vendor to pay for the papers which he has taken from the publisher. No employee of the publisher thereafter contacts the vendor, and the vendor is free to sell his newspapers in the ways, method and manner that he may see fit.

We will present evidence to show that, applying the common law test, there is no control, no right of control by the publishers over the vendors. In fact, the evidence will probably go to a greater point than that. It will probably show that if there is any control by any party, the control is entirely on the part of the Vendors' Union over their own men and not control by the publishers over the vendors. [7]

A matter which I think may need a moment of explanation, your Honor, is a matter that is bound to arise, and it is this: In the complaint. Exhibit 4, is a contract between a publishers association and the News Vendors' Union. Under the terms, it is what might be called a master contract. Under the terms of that contract, standing alone, not one single newspaper would reach the streets of San Francisco for sale, not one single newspaper put out by any of the three publishers in San Francisco would ever reach the streets. The master contract provides for another and separate contract, which the evidence will show is made as between the publisher and the individual vendors, and it is that contract which we

contend, subject of course to a review of the master contract, must be interpreted by this Court. Each publisher enters into these separate contracts. He may contract with John Brown for a period of time, and later contract with John Smith for the same sales output. And these contracts are the ones, it is our contention, are the ones upon which we must have a judicial determination.

During the early course of the trial, I apprehend that there will be some question of law arise, which normally I assume would not properly be mentioned in an opening statement. However, I want to state briefly the position which we take and state to the Court the position which I apprehend the Government will take. We urge upon the Court and will throughout the trial urge upon the Court that the common law contract of the [8] relationship between these parties must be applied. In other words, using the well-known test, the right of control, the actual control and the right to control, we believe are the determining tests.

We state to the Court that the position of the Government will ultimately be that we must follow the doctrine that it is the mischief to be corrected, and so on, the social economic doctrine of the so-called Hearst case, decided by the Supreme Court. We will further show to the Court during the course of the trial that our position on the law is justified, not only justified but is a matter entirely free from doubt by the regulations of the very departments which are now opposing these causes.

I think, if your Honor please, with this very brief statement, I am ready to proceed.

The Court: Do you wish to make a statement?

Mr. Jacobs: If you please.

May it please the Court, I would restate the question somewhat different than Mr. Fink. We believe the question before this Court, the only question before this Court, is whether the street vendors engaged in the sale of the plaintiffs' newspapers under the terms and conditions of the union contract, which is an exhibit to the complaint, are employees within the meaning of the Social Security Act. At the outset, as I tried to make clear on the motion for judgment, we believe that this [9] union contract embodies all of the terms and conditions, all of the right and obligations between the parties, the parties being the San Francisco Publishers Association, as well as the plaintiffs, the publishers, on the one hand, and the union on the other. That contract, and the provisions of that contract are incorporated by reference in the contract between the publishers and the individual vendors under the form of contract which is also attached as an exhibit to the complaint. Now, with respect to that contract, we say we think it is a complete contract. It is our position that no evidence is permissible to explain or in any way indicate the negotiations leading up to the contract. So far as the contract is not ambiguous and unequivocal, it speaks for itself. Further, we submit that no evidence is admissible to show the exercise or non-exercise of any powers conferred in that contract, because it is the existence of the power, not the exercise of the power, that is important.

Third, with respect to the contract, it is our position that no evidence is admissible to alter or vary the terms of that contract.

Now, with respect to the question of employees, the interpretation of the word "employee," since there is no statutory definition, it is our position that the term "employee" as used in the Social Security Act is not to be interpreted in a common law sense, as Counsel for the [10] plaintiffs contends. It is to be interpreted in light of the legislative purpose and there is authority which supports the Government's position. In any event, it is our position that these news vendors are employees within the common law definition, if there is a common law test as such, as well as employees within the meaning of the term as Congress intended that term to be construed.

Now, in listening to the evidence, we think it would be well for the Court to note the salient features of the contract, to note generally what is covered, because already I think there has been one misstatement of that provision of that contract. There are ten salient features to that contract. Ten features and provisions, which I shall not elaborate on, but simply point out to the Court, which indicate, which we believe establish as a matter of law, from the construction of the contract, the relationship created is that of employer and employee. At the outset we ask the Court to note that the parties to the agreement are, on the one hand, the publishers and the publishers association, and on the other hand a labor union, a news vendors union of

the American Federation of Labor, which Mr. Fink referred to as an organization.

Secondly, it is evident from the very wording of the agreement, that the object of the agreement, the object of the contract, is not to provide for the sale of newspapers to [11] the vendors, but is to provide for the sale by vendors of these newspapers to the public. The ultimate objective of the agreement is to provide for the sale by the vendors, not to vendors, of the plaintiffs' newspapers.

Thirdly, we ask the Court to note that the so-called wholesale and so-called retail price of the newspapers is established by the contract.

Fourthly, we ask the Court to note and observe that not only has the publisher the right to hire whomever he pleases, it necessarily follows they must have the right in addition to that right, more significant, the right to terminate the agreement with any vendor at any time. It is euphemistically stated as the right to discontinue the sale to any vendor, but we submit it is nothing more nor less than the right to hire or fire.

Fifthly, we ask the Court to note that the publishers reserve the right implicitly to designate where the papers are to be sold.

Sixthly, the contract gives the publishers the right to designate the days and hours of any one day in which newspapers are to be sold.

Seventhly, the contract provides that these vendors shall sell complete newspapers only, with sections thereof in such order as the publishers designate.

And, eighthly, and here I must correct I believe a [12] mistaken impression of Counsel for the union: there is an express provision in the contract that when the vendor is engaged to sell a particular newspaper, he may sell only additional newspapers if the publishers permit. In other words, he may sell one or more newspapers only as the publishers permit.

Now, we ask the Court to note that the news vendor is granted full credit for unsold or returned newspapers.

And the last and perhaps the most damaging provision of the agreement is the provision for a guaranteed minimum earning, which is designated in the contract as "minimum profit." So much for the contract.

Now, Mr. Fink also has referred to the power of the vendors to control the means and methods by which they sell the papers. Whether they have that power under that contract is a matter of law, and whether they exercised it or not is immaterial, and in the absence of any express provision to the contrary in the contract, we submit they have not that power. Let it be assumed that the vendor who is selling papers on a corner designated by the publishers, at a time designated by the publishers, at a place designated by the publishers, has a free choice, unlimited discretion as to the means and methods he sells the papers on the corner. We submit he nonetheless is an employee because he has such discretion. That point could be elaborated, but we submit it is almost a subject for [13] judicial

notice that the sales technique of the vendors on the corner is so unlimited, while he is engaged in unskilled employment, so his choice on the corner as to how he sells the papers might as well be entrusted to him and still, as we believe, he is an employee.

Now, with respect to paragraph one of the agreement on which the plaintiffs rely so heavily, Paragraph I states it is the intent of the parties to establish the relationship of buyer and seller and not that of employer and employee. Of course, the Court may well ask itself why such a provision was inserted, gratuitously inserted, unless perhaps furnishing an interpretation of the agreement, and apparently contradicted by the terms of the agreement itself. In any event, it is our position that such statement is not only not binding on the Court, but it is doubtful whether it is even evident to the Court. The contract recites that the relationship is that of seller and buyer, not employer and employee, as though they were legal opposites. I think the authorities we will submit will fully show that a person may be both a buyer and an employee of the person from whom he purchases the product.

Now, lastly, it is doubtful, in our minds certainly, whether under the terms of the agreement, and it will be clarified by the evidence, whether the vendor is actually the purchaser of the papers, because we will show under the evidence, that the vendor gets the papers only on a credit basis. [14] He pays no cash on them, his possession is limited to the corner to sell under the terms and conditions

of the contract. At the end of the working day he returns the unsold papers to the publisher and then gets credit for the unsold papers. I submit it is very doubtful whether under those conditions he may be contended to be the buyer. There can be no doubt if the first purpose of the legislation is considered. The Court in hearing the evidence and being guided in the Court's decision, should give this one single factor the most significance and most weight in determining whether they are covered by the Act. I think the ultimate inquiry here is not control to be exercised, how the vendor sells the papers, whether with his right hand or his left hand, but the question is: Does he pursue an independent calling; is he engaged in a distinct occupation. We think, after hearing the evidence and an examination of the authorities, there can be no doubt, under the terms of the contract alone, that as a matter of law the vendors are employees, and the evidence submitted will only serve to confirm it.

The Court: Mr. Jacobs, some point was made by Mr. Fink in his opening statement that there might be a contention that the parties to this contract did not intend to make a contract, an independent contract. Is there going to be a contention on the part of the Government that these contracts were entered into to give the appearance of an independent contract? I mean, [15] are you questioning, are you arguing the good faith of the contract, or relying entirely upon the interpretation of the contracts themselves?

Mr. Jacobs: Our position, with respect to your Honor's question, is this: As we say, the intention of the parties is in the provisions of the contract, the very nature of the obligations and rights of the parties as stated in the contract, not what it states the relationship to be.

Secondly, we state that if the belief of the parties is evidence of relationship, it must be a bona fide belief of the factual considerations, and not by reason of any selfish, personal, or legal considerations, and I think the evidence will establish, at least on the part of the union, that there was no such bona fide belief. Do I make myself clear, your Honor?

The Court: Well, I would like to ask you another question to see if I get it clearly. Is the Government going to contend that these parties had no intent to enter into an independent contractor relationship, but used this form in order to give that appearance?

Mr. Jacobs: We submit——

The Court: What I am getting at is: Is there any contention that this relationship was entered into for any purpose of evading obligations under this statute, to give the appearance to a relationship different than the actual [16] relationship; or, are you contending, on the contrary, that irrespective of what the parties had in mind, the relationship as set out in the contract is one of employment rather than independent contract?

Mr. Jacobs: That is substantially correct. May I clarify that a little further? I don't know what purpose there was on the part of the publishers.

I cannot say of my own knowledge what the purpose of the publishers was in having this thing inserted in there. But I do know, that is I feel from the evidence we have available, that this was not a bona fide belief of both parties. Even if it was an honest belief, which we doubt, of both parties, assuming it was, I submit that the relationship created by the contract is still that of employer and employee, and there are numerous cases in the courts, where the courts have disregarded such positions.

The Court: You don't contend, do you, that these contractual relationships were entered into for the definite purpose of evading the effect of these statutes?

Mr. Jacobs: Our knowledge of it is this, your Honor, this contract was not designed to evade the obligations of the Social Security Act. It was a genuine collective bargaining agreement; there is no question about that. But, we say that the insertion of this particular clause in the contract was not a bona fide belief on the part of both parties.

Mr. Fink: If the Court please, there are some formal [17] offers of exhibits that I desire to make at this time.

In case No. 25229, I offer in evidence the exhibits attached to the complaint, in the same order. Exhibit 1 is the claim for the period April 1937 to December 1937. And I ask that they be admitted in evidence, if your Honor please, because they are all admitted by the pleadings.

The Court: They may be admitted.

The Clerk: Are they to be in the case referred to, or consolidated?

The Court: I think you can give them one number. These cases are consolidated for trial, as I understand. I think you might as well introduce them as exhibits, and we will give them exhibit numbers in order.

Mr. Fink: I am, if the Court please, going to offer these generally now, and we will refer to them afterwards.

The Court: This is Plaintiff's Exhibit No. 1

(The claim was marked Plaintiff's Exhibit No. 1 in evidence.)

Mr. Fink: Exhibit No. 2 is the claim of the Federal Insurance Contributions Act for the period shown.

(The document was marked Plaintiff's Exhibit No. 2 in evidence.)

Mr. Fink: Exhibit No. 3, which is the disallowance of a large list of claims, your Honor, by the Commissioner of Internal Revenue, on this date, July 13, 1945. [18]

(The document referred to was marked Plaintiff's Exhibit No. 3 in evidence.)

Mr. Fink: Exhibit 4 is the contract between the parties to which reference has been made.

(The document referred to was marked Plaintiff's Exhibit No. 4 in evidence.)

Mr. Fink: Exhibit 5 is a claim of refund and a protest covering the period October, 1938, to December, 1938.

(The document referred to was marked Plaintiff's Exhibit No. 5 in evidence.)

Mr. Fink: Exhibit No. 6 is a similar claim and protest for a similar period.

(The document referred to was marked Plaintiff's Exhibit No. 6 in evidence.)

Mr. Fink: Exhibit No. 7 is a claim and protest for the period January 1, 1939, to March 31, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 7 in evidence.)

Mr. Fink: A claim and protest for the same period.

If your Honor please, in the Western Publications case, there were two newspapers involved, the San Francisco Call-Bulletin, and the San Francisco Examiner. The collector in assessing, levied separate assessments, so there are two exhibits covering the same period.

(The document referred to was marked Plaintiff's Exhibit 8 in evidence.) [19]

Mr. Fink: Exhibit No. 9 is a protest and claim covered by the period April 1, 1939, to June 30, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 9 in evidence.)

Mr. Fink: Exhibit No. 10 is a similar claim and protest for the other newspaper for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 10 in evidence.)

Mr. Fink: Exhibit No. 11 is a claim and protest for the period July 1 to September 30, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 11 in evidence.)

Mr. Fink: Exhibit 12 is a claim and protest for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 12 in evidence.)

Mr. Fink: Exhibit No. 13 is a claim and protest for the period October 1, 1939, to December 31, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 13 in evidence.)

Mr. Fink: Exhibit No. 14 is a similar claim and protest for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 14 in evidence.)

Mr. Fink: Exhibit No. 15 is a claim and protest for [20] the period January 1, 1940, to March 31, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 15 in evidence.)

Mr. Fink: Exhibit No. 16 is a similar claim and protest for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 16 in evidence.)

Mr. Fink: Exhibit No. 17 is a claim and protest for the period April 1 to June 30, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 17 in evidence.)

Mr. Fink: Exhibit No. 18 is a similar claim and protest for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 18 in evidence.)

Mr. Fink: Exhibit 19 is a claim and protest for the period of October 1, 1940, to December 31, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 19 in evidence.)

Mr. Fink: Exhibit No. 20 is a similar protest and claim for the same period.

(The document referred to was marked Plaintiff's Exhibit No. 20 in evidence.)

Mr. Fink: May I state, for the purpose of the record, that completes the exhibits attached to the complaint in that [21] particular number. So, here, for the record that completes the exhibits in Case No. 25229.

For the purpose of the record only, your Honor, I recognize they are consolidated, in No. 25228, I offer the following exhibits, all of which have been

admitted by the answer. They are going to run right along?

The Court: They are going to run right along.

Mr. Fink: Exhibit No. 21 is a claim and protest for the period January 1, 1937, to December 31, 1937.

(The document referred to was marked Plaintiff's Exhibit No. 21 in evidence.)

Mr. Fink: Exhibit No. 22 is the rejection letter from the Commissioner of Internal Revenue dated July 13, 1945.

(The document referred to was marked Plaintiff's Exhibit No. 22 in evidence.)

Mr. Fink: I will not introduce another copy of the contract, although it is attached, your Honor.

Next in order, if your Honor please, is a claim and protest for the period January 1, 1938, to December 31, 1938.

(The document referred to was marked Plaintiff's Exhibit No. 23 in evidence.)

Mr. Fink: Finally, next in order a claim and protest for a period that is not made plain here, but a claim and protest in the total sum of \$2,187.76.

(The document referred to was marked Plaintiff's [22] Exhibit No. 24 in evidence.)

Mr. Fink: That completes all of the exhibits in No. 25228.

For the purpose of the record, in No. 25231, I offer the following exhibits in evidence:

A claim and protest for the period April 1, 1937, to December 31, 1937.

(The document referred to was marked Plaintiff's Exhibit No. 25 in evidence.)

Mr. Fink: Next in order, the rejection letter from the Commissioner of Internal Revenue, dated July 13, 1945.

(The document referred to was marked Plaintiff's Exhibit No. 26 in evidence.)

Mr. Fink: I will not offer the contract. A claim and protest for the period October 1, 1938, to December 31, 1938.

(The document referred to was marked Plaintiff's Exhibit No. 27 in evidence.)

Mr. Fink: A claim and protest for the period January 1, 1939, to March 31, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 28 in evidence.)

Mr. Fink: A claim and protest for the period April 1, 1939, to June 30, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 29 in evidence.) [23]

Mr. Fink: A claim and protest for the period July 1, 1939, to September 30, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 30 in evidence.)

Mr. Fink: A claim and protest for the period October 1, 1939, to December 31, 1939.

(The document referred to was marked Plaintiff's Exhibit No. 31 in evidence.)

Mr. Fink: A claim and protest for the period January 1, 1940, to March 31, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 32 in evidence.)

Mr. Fink: A claim and protest for the period April 1, 1940, to June 30, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 33 in evidence.)

Mr. Fink: A claim and protest for the period October 1, 1940, to December 31, 1940.

(The document referred to was marked Plaintiff's Exhibit No. 34 in evidence.)

Mr. Fink: And that completes the offer in that individual case.

Finally, if your Honor please, in Case No. 25230, I offer in evidence the following:

A form of protest bearing date February 18, 1942, signed [24] by The Chronicle Publishing Company, by W. D. Burlingame.

(The document referred to was marked Plaintiff's Exhibit No. 35 in evidence.)

Mr. Fink: The rejection letter from the Commissioner of Internal Revenue, dated July 13, 1945.

(The document referred to was marked Plaintiff's Exhibit No. 36 in evidence.)

Mr. Fink: A claim and protest for the period January 1, 1937, to December 31, 1937.

(The document referred to was marked Plaintiff's Exhibit No. 37 in evidence.)

Mr. Fink: A disallowance letter from the Commissioner of Internal Revenue, dated July 13, 1945, referring to another one of the exhibits.

(The document referred to was marked Plaintiff's Exhibit No. 38 in evidence.)

Mr. Fink: And finally, a claim and protest in the total sum of \$668.06.

(The document referred to was marked Plaintiff's Exhibit No. 39 in evidence.)

Mr. Fink: That, if your Honor please, completes the offer of the exhibits.

Mr. Jacobs: With the permission of the Court, I would like to submit a brief in support of the Government's motion at this time. [25]

The Court: What motion are you referring to?

Mr. Jacobs: The motion for a judgment on the pleadings, which has been taken under advisement by the Court.

The Court: Oh, well, you can submit it at the conclusion of the trial. As long as I am going to hear the evidence, I would rather devote myself to that than to reading a brief during the course of the trial.

Mr. Jacobs: Very well.

Mr. Fink: If it please the Court, I will call Mr. Bitler.

The Court: Is he going to be a long witness?

Mr. Fink: It will be a lengthy witness.

The Court: Would you rather take a recess?

Mr. Fink: I don't care.

The Court: I think we had better use the five minutes.

Mr. Fink: Certainly.

EUGENE F. BITLER

called as a witness by Plaintiff; sworn.

The Clerk: State your name to the Court, please.

A. Eugene F. Bitler.

Direct Examination

By Mr. Fink:

Q. What is your occupation?

A. Manager of the San Francisco Publishers Association.

Q. And how long have you been in that position?

A. Eleven years.

Q. In San Francisco? A. Yes, sir. [26]

Q. Mr. Bitler, what is your familiarity with the newspaper business? Will you state your familiarity with the business, please.

A. Well, since 1914, outside of two years in the first war, all my life has been spent in the business.

Q. And when you say you have spent your life in the newspaper business, in what several departments of the newspaper business have you been?

A. Starting in the circulation department, going to the business office, from the business office

(Testimony of Eugene F. Bitler.)

to the classified department, then to display, then to editorial.

Q. And have you had actual experience over the course of years in the circulation department of the various papers in San Francisco and elsewhere?

A. Yes, I have.

Q. Mr. Bitler, does your name appear as the signer of all five of the contracts between the News Vendors Union and the newspapers in San Francisco?

A. Yes, it does.

Q. Now, directing your attention, Mr. Bitler, to the year 1937, do you remember the time, the approximate date when negotiations opened as between the News Vendors Union and the Publishers Association?

A. I would say around June 8th or 9th.

Q. And it thereafter continued from time to time, did it?

A. It was fairly continuous. You mean, for that particular contract?

Q. I do.

A. They were fairly continuous up to August 1st when the agreement was entered into, signed by both parties. [27]

Q. A contract was signed and is now in evidence as an exhibit here. Is that correct?

A. I guess it is.

Q. Mr. Bitler, having in mind the date of the opening, which was around June 8th or 9th, of the negotiations, when did the question of the relationship of the parties arise?

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: Objected to on the ground that it is immaterial and irrelevant. When the question arose; the intent of the parties is contained in the agreement and the negotiations, the steps or negotiations are entirely immaterial.

The Court: At first blush that would appear to be a valid objection.

Mr. Fink: It is a preliminary question only, and was intended to lay a foundation for subsequent questioning. I take it, whether the negotiations were merged into a written contract or not, we have a right to show the intent of both parties. We have a right to show the intent of the parties and to show when that intent arose. As I say, it is a preliminary question only, laying the foundation.

The Court: What would be the materiality of when the intent arose?

Mr. Fink: Simply to show, if your Honor please, that from the opening of negotiations in June, 1937, down to date, there has been a single intent of the parties to this contract. That is the issue here, what was the intent of the parties.

The Court: Well, of course, wouldn't it be self-serving [28] for any witness to testify? That is a matter the Court has to determine.

Mr. Fink: Just a minute. The question, your Honor, I think you must have misunderstood the question. The question was "When did it first arise?" I apprehend the witness will say immediately.

(Testimony of Eugene F. Bitler.)

The Court: I don't see how that will be any help to me, Mr. Fink. I think anybody who negotiates a contract has some intent in making the contract.

Mr. Fink: That is true.

The Court: They have got some purpose in mind. It is not when they had the purpose in mind; it is what they did that counts, isn't it? I think perhaps you might offer the contract, show what the parties did under the contract, submit that. If there is any question as to the meaning of the contract itself, the actions of the parties under the contract would be evidence. But, what intent you say they had, when the intent arose, really I don't see the materiality.

Mr. Ladar: I would just like to offer a suggestion in connection with the objection made here. I apprehend that while it is settled law that parties to a contract in dispute between them cannot offer evidence as to intent or any variance, nevertheless, I don't think it is the law, I think it would be easy to supply your Honor authorities on the proposition, that an objection such as the one made now—I am not talking about [29] the particular question, but the broad issue, whether the intent of the parties is evidence, it is a well known exception that when a third party is in the case, the intention is not only relevant and admissible, but may become important in the face of an objection from a third party. The rule excluding the evidence is limited to the parties to the contract.

(Testimony of Eugene F. Bitler.)

The Court: I think during the noon recess I had better read this contract and after I have done that, I can more intelligently rule on the question. We will recess until 2:00 p.m.

(Adjourned to 2:00 o'clock p.m. this date.)

Afternoon Session, 2:00 P.M.

EUGENE F. BITLER

resumed the witness stand for further direct examination:

Mr. Fink: If your Honor please, may I address myself for a moment to the objection which was made just before the noon adjournment. If the Court will refer to Paragraph 12 and Paragraph 15—the numbers vary slightly in the complaints, but it is in 25229—you will find that Paragraph 12 of that complaint reads:

“During all of the period of the negotiations of the said contract, Exhibit 4, and at the time of the execution thereof, it was the intent and purpose of the organization of News Vendors and of Plaintiff to create and maintain as between the News Vendors and Plaintiff the relationship of buyer and seller and to establish and maintain the News Vendors and independent contractors.”

Paragraph 15 of the same complaint reads:

“During all of the period of negotiation of each of the said four contracts subsequent to

(Testimony of Eugene F. Bitler.)

Exhibit 4, and at the time of the execution of each thereof, it was the intent and purpose of the organization of News Vendors and of Plaintiff to maintain the relationship of buyer and seller and to maintain the [31] status of the said News Vendors as independent contractors. Said parties during the term of each of said contracts have acted with the intent and in the belief that said contracts would be interpreted and construed as intended by said parties."

Both of those paragraphs are denied in the answers, thus making a direct issue as to the intent and purpose of the parties in their negotiations and in the consummation of the contracts.

And over and above that, and stronger in its import as far as this objection is concerned, is the fact that Counsel for the Defendant has directly, in his opening statement, by which he is bound, said, not in so many words, but by necessary inference, that these are fraudulent contracts. It was in answer to the question asked that he made that statement. He, in effect, has said that these are not good faith contracts, and therefore he is directly putting in issue the intent, the purpose and all the surrounding circumstances of these contracts.

The Court: Well, I didn't get that from his statement, that it was a fraudulent contract.

Mr. Fink: Well, your Honor, we will have to go to the record on that, because that is my recollection of what he said, by necessary inference; that you can't get anything else out of what he said.

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: Would the Court like to have me restate [32] my position?

Mr. Fink: Let us go to the record for this, your Honor.

The Court: Let's not waste time in going back over that. That is the allegation of your complaint. It is denied, but the question that is presented is, what kind of evidence is admissible under the issue raised by that allegation of the complaint and the answer? And the objection, I think, that has been raised goes more to the kind of evidence. You may have acts and conduct of the parties under the contract that would be properly admissible as evidence to prove that allegation of the complaint, but what they said during the stage of negotiations might not be admissible as evidence. In other words, merely because you have alleged that as the ultimate fact doesn't mean that every type of evidence may be offered in support of it. I would not consider myself bound by some statements that were made by both sides of this contract while they were negotiating the contract as to what they were intending to do, if, in fact, what they did do was something different. I am not saying that is the case here, but those are the difficulties that present themselves and are, in my opinion, valid objections to that kind of testimony.

Mr. Fink: Well, as I said——

The Court: I think that you have presented your contract. You can show what the parties did under it, but [33] all of the conversations that took

(Testimony of Eugene F. Bitler.)

place between them when they were negotiating the contract, I can't see how that would be material.

Mr. Fink: If your Honor please, I think I stated this morning, and it is a fact, that the question which produced the objection is merely a preliminary question going more to the time of the event, rather than to what was said or done at that time. The question was if he remembers when, in relation to June 8th or 9th, did the matter of the relationship of the parties arise. That was the question, I think not the exact words, maybe, but the same thought.

The Court: Of course that may not be subject to that same objection. It is really immaterial, though.

Mr. Fink, it seems to me that you have a question here as to whether or not you are required to pay this tax, and that depends upon what your status is in fact.

Mr. Fink: That is right.

The Court: Now, what the parties said when they were creating the status, I do not see how that would have any effect on the matter. They may have said anything imaginable. They may have said it was their intent to create a vast corporation; but it is the status of the plaintiff and of the newsboys, news vendors, that is going to determine whether or not you are subject to paying the tax. That question of status is a question of physical fact. What is it? Not what the [34] parties said they were going to do when they did it, but what are they doing

(Testimony of Eugene F. Bitler.)

and what is their relationship today? Under what instrumentality or contract or agreement or structure are they functioning, and what are they doing? And those are the facts it seems to me, on which the Court should decide whether or not the statute requires the payment of that tax.

Mr. Fink: There is no question that the——

The Court: I think that is a fair statement of what I have to decide. I can't see how anything that the parties said in negotiating these contracts could make a bit of difference one way or the other, because, as a matter of fact, I wouldn't feel that I should pay much attention to it even if it went into the record and were by some standard admissible, because I might have a long discussion with you and say, "Well, Mr. Fink, now I am going to employ you as my secretary," and you say, "All right, I want to be your secretary"; and then we sit down and we make a contract which provides instead of you being my secretary, it said you are going to sell some property of mine on a commission basis. The fact that we had those conversations couldn't possibly change the factual situation that actually subsequently obtained. I can see that I could be led into a great many pitfalls by listening to conversations that took place between the parties that couldn't possibly change what is actually the fact. Now, if it is the fact that these news vendors are independent contractors, you [35] should not have to pay this tax.

Mr. Fink: That is true.

(Testimony of Eugene F. Bitler.)

The Court: If, in fact, they are employees, then you should have to pay the tax.

Mr. Fink: That is right.

The Court: Why don't you just give me the evidence on that and present your argument on that?

Mr. Fink: Well, if your Honor please, seriously—and I am really serious—we deem this to be the crux of the case, to show the surrounding circumstances under which the first contractual relationship—that is the first written contract—came into being. I do not intend, and my question does not import it, that I am going into detailed conversations or anything of that sort. As I have tried to make plain, the question has for its purpose the eliciting of an answer, which is a fact, from the witness that this question arose almost at once, and that thereafter they proceeded upon a particular basis and concluded the contract. Now, that is as far as the evidence will go, and I think, if your Honor please, in view of the opening statement of Counsel—respectfully disagreeing with the Court—that I am entitled to make that showing.

The Court: Well, I just don't think that he used the word "fraudulent."

Mr. Fink: Well, I didn't say that he used the word "fraudulent." I said by necessary inference what he did say [36] that there could only be the one interpretation, namely, that he is alleging that it is a fraudulent contract.

(Testimony of Eugene F. Bitler.)

The Court: Well, suppose you restate the question again.

Mr. Fink: May it be read?

The Court: It will take too long; we haven't the same reporter at the time that you asked the question to which the objection is made.

Mr. Fink: All right, your Honor.

The Court: You say you are not going into any detail as to the conversations. It may be the question will be more or less harmless.

Q. (By Mr. Fink): Mr. Bitler, having in mind the probable opening date of these negotiations, June 8th or 9th, when, in relation to that date, did the matter of the relationship of the parties first arise?

Mr. Jacobs: The same objection, your Honor.

The Court: I will overrule the objection. You have my views on it and you know how much weight I am going to attach to it anyhow, so I don't see any harm in allowing it in the record.

A. At the first meeting, the question—as a matter of fact, the only thing discussed at the first meeting was the relationship between the parties. The publishers stated—

Mr. Jacobs: I am sorry; I can't hear you. Not only [37] that, but what I heard was not responsive to the question. The question is When? Is that right?

A. At the first meeting.

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: I am sorry; may be I didn't understand the question. Will you read it, please?

(The Reporter read the question.)

A. My answer is, at the first meeting, whether it was June 8th or June 9th; I don't recall which.

Q. (By Mr. Fink): Mr. Bitler, how did it arise? A. It arose from——

Mr. Jacobs: Same objection, your Honor, to this whole line of testimony.

The Court: Well, Mr. Fink, what are you going to show from this witness? Perhaps that will enable me to rule on it a little more intelligently and get over this phase of the matter. Do you want to show that the parties entered into a discussion as to whether they were going to be employees or whether they were going to be independent contractors; that they discussed it, and that as a result of that, they worked out the contract the way the contract is worked out?

Mr. Fink: If your Honor please, one step further than that. The negotiations opened on June 8th or June 9th. They were almost continuous to August 31st, 1937, a considerable period of time, about three months.

The purpose of the question is to show that while the [38] union had some ideas at the opening that they wanted to come under the employees' status, that there immediately arose a question; that as a result of that, the union retired from that position and that during the entire three months there was

(Testimony of Eugene F. Bitler.)

thereafter no question as to the basis of the negotiations. That is the sole purpose of the question, and it is not intended to elicit detailed conversatons at all.

The Court: Well, I think I can shorten that up. You heard Mr. Fink's statement; is that a correct statement of what went on, Mr. Bitler?

A. I think I should put it in my own words, if you please, your Honor. At the first meeting the publishers stated that they were willing to negotiate with the union on the basis of a buyer and seller contract. That was agreeable to the union. Attorneys were brought in, Mr. Fink and Mr. Calkins, to develop a contract which was a buyer and seller contract. Does that answer the question?

The Court: That is what you wanted to bring out?

Mr. Fink: Yes, your Honor.

The Court: All right.

Mr. Jacobs: Your Honor, I must move to strike that answer.

The Court: You may have been deemed to have made a motion to strike it, and it is denied.

Mr. Jacobs: Because it calls for a conclusion, and it is hearsay. [39]

The Court: I think it is subject to those objections. I will overrule the objection.

Q. (By Mr. Fink): Mr. Bitler, let me ask you—did I understand you to say that attorneys were imported into the discussions?

(Testimony of Eugene F. Bitler.)

A. After the first meeting, with an agreement being reached with the union and they were buyers and sellers and the contract could be developed on that basis, attorneys Grove Fink and John Calkins were asked to develop a contract on a buyer and seller basis.

Mr. Jacobs: I move to strike all of that as not responsive to the question. The question is whether attorneys were brought into the conference.

The Court: You are right about that. Your objection is good; that was the question. I think the witness had already answered it, Mr. Fink. He said, in answer to my question that attorneys were brought in.

Mr. Fink: All right.

Q. In the course of the negotiations, Mr. Bitler, were the several sections of the contract negotiated separately?

A. Yes, they were. As a matter of fact, agreement might be reached on anywhere from one to two or three sections at one meeting; at another meeting another three or four sections; another time it might have to be modified and revamped and [40] different language developed to cover an agreement that was finally reached.

Q. By the way, who represented the News Vendors Union in these negotiations?

A. At that time it was the Pacific Coast Labor Bureau; at the present time it is known as the National Labor Bureau.

(Testimony of Eugene F. Bitler.)

Q. Who was the personality that negotiated for the union?

A. Sam Kagel, with Mr. Shelley of the San Francisco Labor Council.

Q. Was there always unanimity of opinion on the several subjects or several sections covered by the contract?

Mr. Jacobs: I object as irrelevant, incompetent and immaterial, and calling for the conclusion and thought of this witness.

The Court: I will sustain the objection. I think it is incompetent.

Q. (By Mr. Fink): Mr. Bitler, I think you testified you have been in San Francisco for eleven years.

A. Yes, sir.

Q. Do you know what the position of the news vendors was in San Francisco prior to August 31, 1937?

Mr. Jacobs: Objection as to what the position was; I don't know myself what Counsel means.

Mr. Fink: Well, let us withdraw the question and see if we can get it so even you can understand it.

Mr. Jacobs: Thank you. [41]

Q. (By Mr. Fink): Mr. Bitler, are newspapers sold in the City of San Francisco to news vendors on a wholesale basis prior to August 31, 1937?

Mr. Jacobs: Same objection, whether they were sold or not.

The Court: Well, I think that is immaterial. I will sustain the objection.

(Testimony of Eugene F. Bitler.)

Mr. Ladar: If your Honor please, may I say a word on that, not with respect to the ruling, but with respect to the general subject matter? I took the trouble to check it during the noon hour, and I want to call this to your Honor's attention, that as I understand what Counsel has been attempting to do, he is attempting to show the circumstances surrounding the parties at the time that the series of contracts began. The decisions seem to be quite uniform in this rule, your Honor, that where, as happened here this morning, a statement is made in response to the Court's question, that one section of this contract at least with respect to one of the parties was not made in good faith, and furthermore the statement was made that the relationship of buyer and seller and not independent contractors, is referred to in the contract, and that there may be a meaning there other than independent contractor, the Court should—I mean, certainly the Court is legally empowered, and in the exercise of that power should take into consideration all of the circumstances that surrounded these [42] parties at the time of the execution of their contract, because the question of good faith and the question of meaning and intention is injected into the case.

The Court: Well, of course, you do not have to meet the defendant's opening statement as part of the plaintiff's case. He just made his statement to advise the Court what he was going to contend, but you don't have to start out and affirmatively prove

(Testimony of Eugene F. Bitler.)

such an issue as good faith until there has been something for you to rebut along that line. I think that is a fallacy in the reasoning of both you and Mr. Fink. You show your contract, it is up to the other side then to show that the contract doesn't truly represent the actual situation. You don't have to meet that in advance.

Mr. Ladar: That is true, except that it was formulated in the pleadings in the first instance as one of the issues if you read these pleadings.

The Court: It may have been an issue the defense raised. You don't have to meet it as part of your case until you have got something to meet. They may present that, but until they do present it you haven't anything to meet along that line as far as I can see. I don't see why you just don't get along and present the evidence as to the relationship of these parties, and if it is necessary to rebut any showing that is something that is artificial about this contract or this relationship, you can do that by way of rebuttal. But I think [43] that you are anticipating defenses, aren't you?

Mr. Ladar: The flesh and blood of the relationship comes into being and the circumstances they found themselves in on a certain date, and they pass from that to what they did. And those two things together would probably more clearly make and show the relationship, and I think Mr. Fink's last question might be important——

The Court: I don't know what you are getting at. The opening statement didn't indicate to me

(Testimony of Eugene F. Bitler.)

that the attorneys were going into any preliminary matters at all.

Mr. Ladar: The last question——

The Court: What is it you want to show by this? Tell me what it is, then maybe I can understand what you are getting at.

Mr. Fink: If your Honor please, I believe it important to show, in view of the attitude on the statement of Counsel, I believe it to be pertinent and necessary to show that this was an arms-length negotiation wherein the base subject matters which Counsel indicated as indicative of the employer-employee relationship are just contract negotiations.

The Court: May I ask you a question, then I think I can get at it more quickly. Prior to this contract there was no contract?

Mr. Fink: There was no written contract. There were contracts. [44]

The Court: There were disputes existing as to the terms and conditions of the relationship between the news vendors and the newspapers?

Mr. Fink: No, we know of no disputes. All we know is that upon some date in June, or possibly late in May, we were approached that an organization wanted to negotiate with us. That was the fact, there was no dispute. This organization which was formed in May, I believe, some time, or finally formed in May 1937, came in and said they wanted to negotiate and we said, "All right." As far as we know there was no dispute at all.

(Testimony of Eugene F. Bitler.)

The Court: Previously you had had relations with the news vendors independently of the association; is that what you mean?

Mr. Fink: That is true, your Honor.

The Court: Now, you want to show at this time this contract was negotiated it resulted from overtures to the publishers organization?

Mr. Fink: That is true. That is true. There was no dispute; it wasn't the result of any——

The Court: How will that throw any light upon the interpretation of this relationship?

Mr. Fink: If your Honor please, I don't know how it would make it plainer except to say again that it does show that these various things that the Government is saying spell [45] employer-employee were the result of negotiation which finally resulted in contracts. Apparently the position of the Government must be that these conditions were imposed by force upon the union.

The Court: That is the first time you have told me something that lets light on it. I think that may be the case.

Mr. Fink: I anticipated that.

The Court: All right, go into that.

Mr. Jacobs: May I state for the purpose of the record——

The Court: You may have an objection.

Mr. Jacobs: That is not the Government's position.

The Court: Well then, it cannot do any harm to let it go in. We will save time.

(Testimony of Eugene F. Bitler.)

Mr. Fink: Now, I don't know whether there was a question pending. If there was, I will withdraw it and start again.

Q. Mr. Bitler, did the subject of the wholesale and retail prices of newspapers arise during the period of these negotiations in 1937?

A. Yes, it did.

Mr. Jacobs: May it be understood that the Government's objection goes to the whole line of this testimony?

The Court: All right. Let the record show that.

Q. (By Mr. Fink): Will you just state generally: The parties had divergent views on the wholesale and retail prices. Is that accurate? [46]

A. Yes.

Q. And did you ultimately reach the agreement as expressed in the contract? A. We did.

Q. Mr. Bitler, during the course of these negotiations did the subject-matter of the selling hours arise? A. Yes, sir.

Q. And were there divergent views of the parties on matters of selling hours?

A. To some extent, not too far distant from each other.

Q. One party proposed a certain period of time and another party proposed a different period of time?

A. The publishers proposed a period, if I might say, in accordance with edition times, reader habits, and so forth.

(Testimony of Eugene F. Bitler.)

Q. And the union presented a plan of different scheme for selling hours?

A. Originally they presented an original plan, that is, the plan for selling, but there was not much discussion over the matter of hours. Finally, it evolved in the contract.

Q. Ultimately that resulted in a meeting of minds? A. Yes, sir.

Q. By the way, you mentioned something about edition time, Mr. Bitler. Can you briefly describe what dictates the selling hours of newspapers?

Mr. Jacobs: An objection, if it please the Court, unless you qualify this man as an expert, not only on the newspaper business, but that he is authorized to speak for the practice of each of the publishers here involved, and each newspaper here involved. If anybody is qualified to testify here it is [47] the newspaper publisher himself.

Q. (By Mr. Fink): Mr. Bitler, didn't you testify you had been in this business since you were fourteen years of age? A. Since 1914.

The Court: I will overrule the objection.

Q. (By Mr. Fink): Be brief about it, Mr. Bitler; what determines the selling hours of newspapers?

A. The release of news and the reading habits of the public in different localities. In other words, in San Francisco you want evening papers to hit the streets earlier than probably in Portland or Seattle, or some other city. It is all a matter of

(Testimony of Eugene F. Bitler.)

the release of news and reading habits of the public in the locality.

Q. Does wire receipt of news by newspapers have anything to do with the selling hours?

A. Yes.

Q. Does the concentration of the public at given points at given times have anything to do with the determination of selling hours?

A. Yes, it does.

Q. And from those elements, the edition time is fixed. Is that right? A. Yes.

Q. Now, Mr. Bitler, do you recall a discussion on the subject of sales outlets on the corners?

A. Yes, sir.

Q. And did that occupy a considerable part of the time of the negotiating committee?

A. It did.

Q. Were there divergent views on the subject of sales outlets? [48]

A. There were, due to the fact that the union desired to protect its members insofar as their profits were concerned. In other words, at some outlets there was a question as to how near a news vendor at another outlet could be, the ratio of newsboys to news vendors in certain zones throughout the city, and other matters which were duly negotiated and set forth in the contract, as I say, to protect the profits of the news men.

Q. Do you recall a discussion on the subject matter of the guarantee of profit?

A. Yes, sir.

(Testimony of Eugene F. Bitler.)

Q. Was that another subject that occupied a considerable period of time over those three months? A. Yes, I would say it did.

Q. And——

A. May I qualify that and say that the guarantee seemingly was not so important as questions surrounding the news vendors selling either full time or part time corners. In other words, seemingly they were more interested in getting a condition in the contract that would protect their profit or sales on the various corners.

Q. And that was designed, then, the corners were designed, together with the guarantee, to give a profit sufficient to justify a news vendor selling at that outlet?

A. That was it. I might qualify that further to say that Mr. Shelley, at his instance a full map of the City was developed and several meetings were held with that map and certain pins used in the map to indicate outlets and setting up the City in zones, setting up the number of newsboys, that is, newsboys [49] under the age of sixteen, the number of newsboys, the ratio of newsboys to news vendors in those various zones.

Q. Mr. Bitler, do the newspaper publishers in San Francisco maintain vendors at various times upon corners which in themselves will be unprofitable?

A. Yes, they do. They do that, if I may go further, they do that because in certain districts one newspaper does not sell and because probably they

(Testimony of Eugene F. Bitler.)

have not had proper representation in that district, or that particular part of the City, and they will put in what they call "dirt" corners to start the sale of newspapers in that particular district.

Q. That relates, does it not, to the matter of circulation? A. Yes.

Q. Those news vendors that are put on these so-called "dirt" corners would not make sufficient profit by the sale alone of newspapers to justify their staying at the outlet?

A. They would not in the beginning, that is, in such a corner supposedly, they would not make the guarantee.

Q. Then the guarantee was a device to secure representation?

A. That and to guarantee the news vendor a certain profit.

Q. Mr. Bitler, from your wide experience in the newspaper business do you know of any contract other than the one in San Francisco that is similar to it? A. The only one——

Mr. Jacobs: I object, if it please the Court. If we are going to have evidence about other contracts, let's have them [50] produced in evidence here.

The Court: What is your purpose?

Mr. Fink: I asked if he knew.

The Court: Do you want to pursue this further?

Mr. Fink: I don't care about it.

The Court: It would not make a difference, would it, if there were other contracts?

(Testimony of Eugene F. Bitler.)

Mr. Fink: Well, it goes to one of the matters that will arise in argument, your Honor. The only purpose of the question is to show that insofar as we know, at this time there are two contracts in the entire United States which are similar to this, two contracts of this character in the entire United States. One is in Oakland and one in San Francisco. Those are the only places we know of. In the argument it will develop, and we will make a point of that, that we are assessed in San Francisco and they are not assessed in Oakland, a matter of discrimination.

The Court: I have enough to do to pass on the merits of this case without passing on the diligence of the taxing authorities.

Mr. Fink: I think, when it comes to a question of discrimination, it is directly in your lap, your Honor.

Mr. Linn: Maybe you will insure an assessment in Oakland now.

Mr. Fink: The question was just to develop that.

The Court: Well, you have stated it. If you say that is a fact, maybe Counsel won't dispute it, for what it is worth it is in the record.

Mr. Jacobs: Similar contracts?

The Court: Yes.

Mr. Jacobs: I certainly do object to it.

The Court: I will sustain the objection. Counsel stated what he was getting at, and it did not seem particularly material.

(Testimony of Eugene F. Bitler.)

Q. (By Mr. Fink): Mr. Bitler, is there a contract which is very much like this San Francisco contract, in the City of Oakland?

Mr. Jacobs: The same objection.

The Court: I think the objection is good. I will sustain it.

Q. (By Mr. Fink): Now, Mr. Bitler, leaving the 1937 contract for the moment, was a new contract negotiated in 1939?

A. Yes. Negotiations were started on that about around September 1938, as I recall.

Q. And was the subject-matter of the relationship of the parties again a matter under discussion?

A. It was.

Q. At the outset of the negotiations?

A. It was.

Q. Was there a meeting of the minds in the difference of opinion finally?

A. There was.

Q. And did the parties agree in the 1939 contract on language [52] similar to the 1937 contract?

A. It was not similar; it was identical.

Q. That was Section 1 of the contract?

A. That is right.

Mr. Fink: And now, for the purpose of the record, I will, your Honor, read at this time Section 1 of the contract which is identical throughout the five:

“Section 1. Each of the parties hereto agrees that the intent of this agreement is to maintain the relationship of seller and buyer,

(Testimony of Eugene F. Bitler.)

and not the relationship of employer and employee, and neither party hereto will construe anything herein, and nothing herein shall be construed otherwise than in accordance with this expression of the intent hereof."

Q. Now, Mr. Bitler, was another contract negotiated in the year 1940? A. Yes.

Q. Did the subject-matter of the relationship of the parties arise at that negotiation?

A. No, sir.

Q. And is it the fact, Mr. Bitler, that the contract of 1940 contains an identical paragraph with the one I just read?

A. Yes, sir, and that was the original union's proposal.

Q. They, themselves, proposed it?

A. Yes.

Mr. Jacobs: May it please the Court, may we have the contracts in evidence instead of this witness testifying?

Mr. Fink: I will be delighted. I was laying a foundation to introduce them. [53]

The Court: Have you seen copies of the contracts?

Mr. Fink: They have copies.

The Court: Is there any objection?

Mr. Jacobs: No, your Honor.

Mr. Fink: I now offer in evidence and ask that it be marked, a copy of the 1939 contract.

(The document referred to was marked Plaintiff's Exhibit No. 40 in evidence.)

(Testimony of Eugene F. Bitler.)

Mr. Fink: A copy of the 1940 contract.

(The document referred to was marked Plaintiff's Exhibit No. 41 in evidence.)

Mr. Fink: A copy of the 1942 contract.

(The document referred to was marked Plaintiff's Exhibit No. 42 in evidence.)

Mr. Fink: And a copy of the 1944 contract.

(The document referred to was marked Plaintiff's Exhibit No. 43 in evidence.)

Mr. Fink: I will say to the Court I am not delivering a copy to Counsel *because already* have got them. They were delivered to them in Washington.

Q. To shorten the examination, Mr. Bitler, is it true that each one of the contracts now introduced in evidence all contain that section 1?

A. Yes.

Q. In the same language? A. Yes, sir.

Q. And it is true also, Mr. Bitler, that beginning with the [54] year 1940, again in 1942, again in 1944, the subject-matter did not even arise?

A. It did not. May I say that each of those agreements were two-year agreements. The first two agreements were one-year agreements.

Mr. Bitler, in the 1939 contract the union submitted an initial proposal, did I understand you to testify? A. Yes, sir.

(Testimony of Eugene F. Bitler.)

Q. And that would have been submitted in 1938, some time in October?

A. No, I would say it was submitted some time prior to August 31, 1939, but what date I am not sure.

Q. I hand you a mimeographed document. Is that the original union proposal for the 1939 contract?

A. Without checking it I would say it looks like it, yes.

Q. I would like you to be sure, if you will. There is a date in the upper right-hand corner in lead pencil. Is that your handwriting?

A. That is my secretary's handwriting. That is right, it is the original proposal of 1938.

Q. This was mimeographed by you in your office?

A. I am not sure, Mr. Fink, whether we mimeographed it or the union mimeographed it and sent us copies.

Mr. Fink: I have just the one copy of this, Judge. I do not have an extra copy.

The Witness: You see, many of these proposals, your Honor, were developed by the Pacific Coast Labor Bureau and they were in position to mimeograph them at times. At other times they [55] were not, all according to the amount of people they had to work on them.

Mr. Fink: If your Honor please, I offer in evidence and ask that it be appropriately marked, the

(Testimony of Eugene F. Bitler.)

Union's proposal which Mr. Bitler has identified, as being the opening of the 1939 negotiations.

The Court: Any objection?

Mr. Jacobs: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 44 in evidence.)

Q. (By Mr. Fink): Now, Mr. Bitler, I hand you a letter on the letterhead of the News Vendors Union of San Francisco, signed by Charles H. Bowers, dated October 6, 1938. Is that a part of the negotiation of the 1939 contract?

A. Yes, sir.

Q. And that was received by you in the ordinary course of mail?

A. Yes, sir. This is the result of I don't know how many meetings. It is the original Union proposal submitted in 1935. This letter dated October 6, 1938, developed by the News Vendors Union contains various sections the Union themselves modified from their original proposal.

Q. Mr. Bitler, referring back to the other document which was the opening proposal for the 1939 contract, I called your attention to a date in lead pencil in the upper right-hand corner, which was July 6, 1938. Does that refresh your [56] recollection as to the opening of the negotiations?

A. There was 60 days notice, any time 60 days prior to the termination of the contract they could open.

(Testimony of Eugene F. Bitler.)

Q. That was the approximate date, anyway, of the opening?

A. Yes. Now, the opening also gave the publishers the privilege of submitting counter-proposals within 35 days, so the original meetings may not begin until 40 or 50 days after the original News Vendors' proposals were submitted.

Mr. Fink: I will now offer in evidence, if it please the Court, the letter of October 6, 1938, to which there is appended a draft of an agreement, and ask that it be appropriately marked.

Mr. Jacobs: I will state that I have no objection to this document as such, reserving my initial objection made to the whole line of testimony.

The Court: Very well. It may be admitted.

(The documents referred to were marked Plaintiff's Exhibit No. 45 in evidence.)

Mr. Fink: Mr. Clerk, may I have Exhibits 44 and 45, please.

May it please the Court, I desire to direct your attention to the fact that the opening draft of the agreement, now Exhibit No. 44, contained as Section 1 the following:

"Section 1. (a) The Publishers recognize the Union as the sole collective bargaining agency for all News Vendors coming under the terms of this agreement. [57]

"(b) This agreement shall apply to the sale of newspapers of the Publishers by News Vendors coming under the terms of this agree-

(Testimony of Eugene F. Bitler.)

ment in the city and county of San Francisco, at the site of the Golden Gate International Exposition, in Daly City, and at special events in San Mateo County.

“(c) A News Vendor is hereby defined to be a person eighteen (18) years of age or over who offers for sale newspapers of the Publishers at retail at or on any point of sale within the area defined in Section 1, paragraph (b).”

And in the letter of October 6, 1938, addressed to San Francisco Newspaper Publishers' Association, it reads:

“Gentlemen: Enclosed you will find copy of Union's revised proposal for your consideration.

“We are ready to resume negotiations with your committee and suggest that we meet Tuesday and Thursday, October 11 and 13, at 10:30 a.m. to 12:30 p.m., and 2:15 p.m. to 4:30 p.m.

“Very truly yours,

“NEWS VENDORS UNION

No. 20769

By CHARLES H. BOWERS,

Secretary-Treasurer.”

I desire to state, without reading it further, that section 1 of the revised proposal, Exhibit No. 45, is identical with [58] those appearing in the other five contracts which already have been introduced, and state the intent of the parties is buyer and seller, independent contractors.

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: That is not a true statement of the contents of that paragraph. It speaks for itself in its printed form.

Q. (By Mr. Fink): Mr. Bitler, can you briefly encompass in a few words what the major changes were in the four contracts after the 1937 contract? I don't want you to go into it in detail, unless Counsel does.

A. Very few changes. One had to do with rezoning in the matter of the ratio of newsboys to news vendors. The matter of guarantees. At one time we had a new agreement. We had to have something in there to cover Treasure Island during the World Fair. But, the majority of changes have had to do with the guarantee. In other words, to the full-time corner and the part-time corner. As a matter of fact, since 1940 I don't believe there has been any discussion on any issue of importance except the guarantees.

Q. May I suggest to you, Mr. Bitler, that you discussed a change in hours after the 1937, the hours of selling?

A. The 1937 contract?

Q. Was there a change?

A. To my recollection the only change made was on the side of the morning newspapers.

Q. That was at the suggestion of the Union?

A. Yes, sir. What I mean is, the morning papers had no sale [59] hours, what were called A.M. Outside Sale Hours.

Q. I think that would be helpful to the Court. I know it was a mystery to me at one time, if you

(Testimony of Eugene F. Bitler.)

will state what the A.M. side and the P.M. side mean. Explain that.

A. I think possibly someone representing the morning newspapers could explain that more fully.

Mr. Fink: All right. Take the witness.

Cross-Examination

Mr. Jacobs: May I see Exhibit No. 44, Mr. Clerk? Before proceeding with the examination of the witness, since this exhibit was read from by opposing Counsel, I should like to read another part of the same exhibit, No. 44, Section 2:

“The Publishers agree that for the sale of newspapers in the areas defined in Section 1, paragraph (b), they will employ and retain in employ only members of the Union in good standing.”

Mr. Fink: Thank you. I had intended to read that and I overlooked it.

Q. (By Mr. Jacobs): Mr. Bitler, you have been for how many years manager of the San Francisco Publishers Association? A. Eleven years.

Q. Have you had any other *employ* in that time?

A. No. Well, I would say this, there is the Oakland Newspaper Publishers Association which I also had under my jurisdiction.

Q. Have you ever worked for The Examiner, The Chronicle, or [60] The Call-Bulletin?

A. Not in any capacity other than as manager for Association.

(Testimony of Eugene F. Bitler.)

Q. Who supports the San Francisco Publishers Association?

A. The four San Francisco newspapers.

Q. Is it a non-profit organization?

A. That is right.

Q. That is your full-time duty?

A. That is right.

Q. Now, do you remember when the News Vendors Union was first organized in 1937?

A. Yes, I do.

Q. Approximately when was it organized?

A. Oh, I would say the early part of May.

Q. You remember when they first requested negotiations for a contract with the Publishers?

A. That latter part of May.

Q. Do you recall that they threatened to strike unless they got a contract with the Publishers?

A. Well, no, I don't right now. They may have. I will have to qualify that, because the Union in many instances threatened to strike, but I do not recall that the News Vendors issued such a statement. They may have, but I am not sure.

Q. Do you remember when they made their first demand for a union contract?

A. I would say the early part of June, or the latter part of May, 1937.

Q. If you recall, at first the publishers refused to negotiate with the union. Is that correct?

A. Not after they received their charter from the A. F. of L. and secured the backing of the San Francisco Labor Council. [61]

(Testimony of Eugene F. Bitler.)

Q. Prior to that time they had refused, had they not?

A. They only refused because the News Vendors had not been able to get a charter, had not been recognized by the A. F. of L., the C. I. O., or the San Francisco Labor Council.

Q. At no time did the publishers refuse to negotiate because the vendors were not employees?

A. I beg pardon?

Q. Do you remember any time the publishers refused to negotiate with the News Vendors Union for the reason that they were not employees?

A. I would say in the first meeting we stated they were not employees. We were willing to negotiate on the basis of buyer and seller relationship, but not employer and employee relationship. We never considered them employees, and they were not employees.

Mr. Jacobs: I move to strike all the answer as not responsive to the question, and I will repeat the question again.

Mr. Fink: Let's have a ruling on the objection. I submit that it was directly responsive.

Mr. Jacobs: No. I asked if at any time——

The Court: I think the answer may go out. The question was whether they refused to negotiate.

Mr. Jacobs: That is right.

A. If I recall, there was no offer on the part of the union to negotiate because they did not have a charter. After they received the charter and submitted the proposal, we were [62] perfectly willing to sit down and discuss it with them.

(Testimony of Eugene F. Bitler.)

Q. Could there have been a threat to strike and you would not know about it, or you may not remember it?

A. I may not recall it, but if there was a threat to strike, certainly it would come to my attention.

Q. But you may not remember it?

A. I may not.

Q. Now, have you in your files, as manager of the San Francisco Publishers Association, the first written proposal submitted by the News Vendors Union for a contract with the publishers?

A. I do have, but I turned it over to Mr. Fink.

Q. You received a subpoena to produce it?

A. Yes.

Mr. Jacobs: Will you produce it, please.

Mr. Fink: It is already in evidence; it is Exhibit 44.

Mr. Jacobs: I beg your pardon. Maybe Mr. Fink did not understand the question.

A. Exhibit No. 44 is the 1938.

Mr. Jacobs: I referred to the original proposal of 1937.

Mr. Fink: Oh, I thought you were referring to the 1939. I am very happy to accommodate you, Counsel.

Mr. Jacobs: Will you mark this for identification, please.

(The document referred to was marked Defendant's Exhibit A for identification.)

(Testimony of Eugene F. Bitler.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit A for identification and ask you if you recognize it?

A. I do, as the original proposal of the News Vendors Union, [63] submitted some time the latter part of May. The identification on here is June 14, 1937, so I guess that is what the date was.

Q. Is Defendant's Exhibit A for identification the first written proposal you received from the union?

A. As far as my recollection serves me, yes.

Mr. Jacobs: At this time I would like to read from Defendant's Exhibit A for identification.

Mr. Fink: Well, let's get it in evidence.

The Court: Yes. Do you wish it in evidence?

Mr. Jacobs: I thought it might be improper to introduce it at this time. I will be happy to.

Mr. Fink: I will be happy to have it in.

Mr. Jacobs: I thought I had to wait for the defendant's case.

The Court: On cross-examination you can introduce it if you wish.

Mr. Jacobs: The Government offers Defendant's Exhibit A for identification, in evidence.

The Court: Any objection?

Mr. Fink: No objection.

The Court: Very well. let it be admitted.

(Defendant's Exhibit A for identification was marked Defendants' Exhibit A in evidence.)

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: (Reading): "Section A. It is agreed by and [64] between the Publishers and the Union that the conditions of employment contained herein will be enforced, recognized and lived up to by the employees of the Publishers who engage news vendors or hustlers selling the papers of the Publishers covered herein."

Reading from Paragraph (1): "Only members of the News Vender's Union in good standing shall be employed from the office of the Union, for the retail sale of newspapers upon the streets and within the limits of the city of San Francisco."

Q. Now, do you recall whether there was any meeting between the publishers, or the Publishers Association or their representatives and the representatives of the Union prior to the first written proposal submitted by the Union, Defendant's Exhibit A?

A. I do not recall such a meeting, no.

Q. The first meeting occurred after the proposal, did it not? A. Yes.

Q. Who were present at that meeting?

A. Representing the Union?

Q. Representing first the San Francisco Publishers Association.

A. Representing the San Francisco Publishers Association was myself; Mr. Gilroy representing the Chronicle; Mr. Ely representing the Call-Bulletin; Mr. Mayer representing the Examiner, and Mr. Paul Stoore representing the News.

(Testimony of Eugene F. Bitler.)

Q. Any representative from the Union there?

A. Yes, Mr. Kagel, as I recall, represented the Union as counsel. If my recollection serves me correctly, I think Mr. Bowers was there. I am not sure so far as the Union committee is concerned.

Q. There were certain members of the Union there at the time. Is that correct?

A. Yes, I would say at least five or six.

Q. You will note in Defendant's Exhibit A, if you may recall it, that the News Vendors refer to themselves in that proposal as employees.

A. Yes, sir, their whole contract, their whole proposal was based on an employer and employee relationship.

Q. Were any attorneys present at that first meeting?

A. Attorneys? No, sir, not as I recall it.

Q. Is it not true that the representatives of the publishers and the Publishers Association told the Union representatives they would not negotiate for a Union contract unless a clause was put in the contract stating they were not employees?

A. It was not put exactly that way. If I may change your question, it was put on the basis that the News Vendors had not been employees, were not employees, we did not consider them employees, we would not negotiate with them on the basis of employer and employee relationship.

Q. Did you not tell them there would have to be a statement to that effect in the contract before the contract would be [66] negotiated?

A. I assume we did.

(Testimony of Eugene F. Bitler.)

Q. At that meeting is it not true that the Union representatives took no action on that proposal?

A. I am not sure whether they took a recess as the result of that meeting and agreed at that meeting or came back a day or two later. I am not sure. It may have been that they had to submit it to their membership. I am not positive.

Q. And is it not true that the Union representatives finally told you they would accept such a proposal as a condition to the negotiations?

Mr. Fink: Wait just a minute. Will you repeat that question?

(Question read by the Reporter.)

A. They did.

Q. (By Mr. Jacobs): Is it not true they told you further that what they were primarily interested in was obtaining a Union contract and establishing working conditions and a fair return for their services?

A. One, they wanted union recognition; two, they wanted collective bargaining; three, as a result of that bargaining they wanted a written contract. We were agreeable to negotiate for the signing of a written agreement with them.

Q. And the representatives told you, did they not, that it was immaterial to them how they were designated in the contract?

Mr. Fink: Now, just a minute. If your Honor please, [67] I have not heretofore objected, but it is now apparent that Counsel is asking, and is going

(Testimony of Eugene F. Bitler.)

to continue to ask for conversations, and if he is going to ask for them, I submit there is a proper way. I object on the ground that no foundation has been laid.

Mr. Jacobs: Now, if it please the Court, on direct examination this witness testified to the purport of conversations throughout the entire negotiations.

The Court: I don't think he went into any conversations. He said they talked about certain of the subjects of the contracts, but he did not say what they said. I think I am correct in that.

Mr. Fink: That is correct. I asked for the subject-matter.

The Court: I think that all Mr. Fink was attempting to do, what he covered in the direct, was that these matters set forth in the contract were a subject of discussion. I think that is as far as he went, I think, in deference to your objection and the Court's ruling.

Mr. Jacobs: I will reframe the question:

Q. Do you recall what the Union representatives said to the representatives of the Publishers at that time was that they would accept such a statement in the Union contract as a condition of negotiations?

A. They informed us they were willing to accept the relationship of buyer and seller. [68]

Q. As a condition of negotiation?

Mr. Fink: Just a minute. I submit the question has been asked and answered, and this is not an answer.

(Testimony of Eugene F. Bitler.)

Mr. Jacobs: He answered the question before.

The Court: I think it has been covered.

Mr. Jacobs: Yes.

The Court: We will take the afternoon recess.

(Recess.) [69]

Q. (By Mr. Jacobs): Do you recall what the union representatives said to the representatives of the publishers at that time was that they would accept such a statement in the union contract as a condition of negotiation?

A. They informed us they would be willing to accept the relationship of buyer and seller.

Q. As a condition of negotiation. Mr. Bittler, who drafted the statement in paragraph 1 of the agreement of August 31, 1937, between the union and the publishers?

A. Oh, I am not sure whether it was a mutually drafted section or whether it was a section which the attorneys drafted and submitted to the union. Now, my recollection is, if it is necessary, I suppose that we drafted the original language. I am not sure that that language is identical to what we originally drafted.

Q. By "we" you mean your attorneys?

A. Well, that is the association which the attorneys represented.

Q. Prior to the first meeting with the union in negotiation at which time you represented to them that you would not deal with them except on a basis that they were not employees, had you consulted with your attorneys on that question?

(Testimony of Eugene F. Bitler.)

A. Oh, the attorneys represent the newspapers, of course, all the time. This question had been up at various times. As I recollect, going back to the original, you understand [70] that that meeting with the union was before it actually submitted us a proposal. Now we had that meeting, and they told us that they had authority from the A. F. of L., they had the recognition of the San Francisco Labor Council and that they wished to negotiate for a contract, and we informed them that we would be willing to negotiate with them on the basis of buyer and seller.

Q. I hate to interrupt, Mr. Bittler. I must repeat the question: Did you consult with your attorneys—did you, as the representative of the publishers, consult with attorneys for the publishers and the Publishers Association with respect to this provision in the contract prior to your meeting with the representatives of the union?

A. I assume we did.

Q. And isn't it a fact that they advised you that if the news vendors were to be treated as employees, that the publishers might be liable for workmen's compensation with respect to such news vendors?

A. It wasn't that. I think the attorneys, if I recall, took the position that at that time the courts, the California courts and others throughout the country, had held that news vendors were not employees and that "You shouldn't negotiate with them on the basis of employees and employer."

(Testimony of Eugene F. Bitler.)

Q. I will have to repeat the question again. There was no discussion whatsoever with respect to whether these people [71] would be covered by workmen's compensation if they were employees?

A. There may have been such discussion, but in the last——

Q. Just answer the question.

Mr. Fink: Wait just a minute. I submit he is answering the question. Let the witness proceed.

Mr. Jacobs: The question can be answered yes or no.

Mr. Fink: Just a minute. The witness has a right to explain an answer.

Mr. Jacobs: Let the Court rule upon this.

The Court: Take it easy, gentlemen. I think that the question does call for an answer as to whether or not the subject of workmen's compensation was discussed.

A. It was discussed.

The Court: If that calls for any further explanation, I think you can make it.

A. I would say it was part of the discussion, yes.

Q. (By Mr. Jacobs): And isn't it true that you also discussed at the same time with the attorneys for the publishers or the publishers association that if the news vendors were to be treated as employees, that the publishers might be liable for damages done to people and property in the course of the performance of their duties?

A. It may have come up, but I do not recall.

(Testimony of Eugene F. Bitler.)

Q. Weren't you aware in 1937, Mr. Bittler, that the Social [72] Security Act had been passed and was in force?

A. I may have been. You understand that the attorneys did not meet with the publishers all the time that they were drafting this proposed contract.

Q. I understand that. I asked you if you knew or were aware on August 31, 1937, and at the time of the negotiations with the union, that the Social Security Act had been passed?

A. To my knowledge, it had not.

Q. You weren't aware of the Social Security Act on August 31, 1937? A. No, I was not.

Q. When did you first become cognizant of the Act?

A. Oh, I would say probably in 1940.

Q. Had there been any employees of the San Francisco Publishers Association prior to that?

A. Oh, there had been; I would say that all the employees were covered by it.

Q. Had you paid any tax out of the Social Security Act? A. Myself, yes.

Q. Prior to that time? A. Yes.

Q. Then you were aware of it, weren't you?

A. The Federal Social Security Act?

Q. Yes. A. Oh, sure.

Q. And you were aware on August 31, 1937?

A. Of the Federal Social Security Act?

Q. That is what I am talking about.

A. Yes. [73]

(Testimony of Eugene F. Bitler.)

Q. You were also aware that if these news vendors were to be treated as employees the publishers would be liable for Social Security Tax, weren't you?

A. I would say that if I was aware of the one I possibly was aware of the other.

Q. Now, Mr. Bittler, on direct examination you stated that the edition time of the newspapers was frequently determined by the concentration of the public. Do I understand you to mean that it is important and necessary to the publishers that they have the papers available for sale at the time the public is concentrated on the streets?

A. I would say that it was.

Q. And with respect to street sales, I presume that it is desirable, for instance, that they have an edition available for sale at the time the business offices in downtown San Francisco, let us say, normally close their offices and people start to go home?

A. I would say so, yes.

Q. And the publishers are also aware, I presume, that unless a sale is obtained at that time to these people going home on the streets of San Francisco, it is not liable to be obtained at all?

A. Not necessarily.

Q. You mean they can purchase a paper at home?

A. Sure; in other words, they could subscribe to the newspaper and have it delivered at home.

(Testimony of Eugene F. Bitler.)

Q. But the publishers deem it desirable to obtain sales at [74] the time that the public is concentrated upon the streets?

A. The various edition times, the difference in the news releases, the different headlines which are featured affect the sale of the newspapers and the buyer desiring them.

Q. How long, to your knowledge, have newspapers been sold on the streets of San Francisco through news vendors?

A. Oh, at least eleven years.

Q. You have not been in San Francisco prior to that time? A. No, I had not.

Q. You also spoke on direct examination, Mr. Bittler, of the so-called dirt corners, by which I understood you to mean corners upon which the vendors were not likely to make the amount guaranteed by the union contract?

A. That is right.

Q. And do I understand you also, Mr. Bittler, to say that frequently the publishers undertake to place vendors on those corners to sell their papers, knowing that the news vendors would not make their guarantee?

A. At the beginning, I would say they did.

Q. And isn't it true, Mr. Bittler, that frequently those corners would remain dirt corners for a considerable period of time?

A. Sometimes they would and sometimes they wouldn't. It is all according to the change in traffic and other conditions.

(Testimony of Eugene F. Bitler.)

Q. There have been occasions, have there not, Mr. Bittler, [75] where corners have remained dirt corners for a considerable period of time?

A. They may have, but I am not an operator; I don't know.

Q. You don't know then, how they are sold, as far as the San Francisco papers are concerned, in that respect?

A. As to whether they remained dirt corners or not, I don't know.

Q. Just based upon your familiarity with the newspaper business?

A. In other words, the Ferry Building might be a dirt corner today, whereas a few years ago it was a very good corner.

Q. Is it true that publishers frequently find it desirable to maintain dirt corners to get what you call representation on those corners?

A. That is right. In other words, they are trying to serve all the people in the best manner that they can.

Q. Even though it costs them something, they have to pay something to the vendor.

A. That is right.

Q. Subsequent to the contract of August 31, 1937, were you aware of any declarations of strike by the news vendors union?

A. I do not recall such a declaration.

Q. There could have been a strike declared and you wouldn't know about it?

A. Well, I do not recall after—let me say that

(Testimony of Eugene F. Bitler.)

if there wasn't any organization, I don't see how there could have been a strike. [76]

Q. No, subsequent to August 31, 1937.

A. Oh, subsequent?

Q. Yes.

A. There may have been. I would not say yes and I would not say no.

Q. There could have been and you would not know it? A. Well, I don't recall.

Mr. Fink: May I clarify one thing? Was the question, Mr. Jacobs, as to a strike or a threat of strike?

Mr. Jacobs: I will put it either, in the alternative, a strike or threat of strike.

A. There was no strike; there has been no strike.

Q. Were you aware, as manager of the San Francisco Publishers Association, of any threat of strike subsequent to August 31, 1937?

A. As I sit here now, I would say honestly that I do not recall.

Q. In your capacity as Manager of the San Francisco Publishers Association, would you be interested in that sort of thing?

A. Yes, I would. And, as a matter of fact, we have had several threats at different times from different organizations, so that they are so numerous that I can't keep track of all of them. You understand that if a strike is to occur by a member of the San Francisco Labor Council, it has to be voted upon by the Council itself. The Council usually calls upon the people involved or invites them to the

(Testimony of Eugene F. Bitler.)

Council chambers and they have a discussion of it. It isn't one of those quickies that is called overnight; it is [77] something where there is considerable thought back of it, so that there may have been such a threat. If so, we were notified by the Council, doubtless, of whatever meetings there were. I don't recall any such meeting upon such a threat.

Q. You spoke on direct examination of the importance of circulation to a newspaper. Based upon your familiarity with the newspaper business, Mr. Bitler, will you explain the importance of circulation to a newspaper?

A. I would say it is the life blood of a newspaper.

Q. Is it a fair statement to say that circulation is important first, because of the revenue derived from sales?

A. Well, revenue is important, yes. Representation is also important.

Q. Isn't it true also that the principal source of income for most newspapers is the advertisers?

A. Oh, it used to be. I would say today that the advertisement probably is less important than it was formerly.

Q. In the years 1937 to 1940, would you say that San Francisco newspapers, or most newspapers, derived most of their revenue from advertising?

A. The majority of it, yes.

Q. And isn't it true, Mr. Bixler, that the income from advertising is largely dependent upon the circulation of a newspaper?

A. I would say it is.

(Testimony of Eugene F. Bitler.)

Q. And that the advertisers look to the amount of the circulation, do they not?

A. Well, here if you are selling an advertiser who has a low priced commodity, naturally he is interested in reaching a group of people that is interested in his commodity. Therefore, you are willing to get circulation that will buy his product.

Q. And by circulation, I presume you mean newspapers which are bought by the public?

A. That is right; either bought by the month through the carrier, or bought on the street and taken home by the buyer.

Q. Is that one of the reasons, Mr. Bitler, why newspapers find it important to maintain representation on so-called dirt corners?

A. I would say it was a very important reason, yes, to give full representation to the advertiser.

Mr. Jacobs: No further questions.

Redirect Examination

By Mr. Fink:

Mr. Bitler, I think that inadvertently you made an error in dates that I want to correct.

Mr. Fink: May I have Exhibits 44 and 45, Mr. Clerk?

Q. I hand you defendant's Exhibit A, which is the union proposals submitted June 14, 1937, and No. 5, which is the union revised proposal, which is accompanied by a letter dated October 6, 1938. I do not need that one. I withdraw that question.

Mr. Bitler, looking at the union proposal of June

(Testimony of Eugene F. Bitler.)

of [79] 1937, and having in mind that your first meeting was some time around June 8th or June 9th, can you identify more clearly the first contact with the union?

A. Well, I know we had a meeting around the 8th or 9th, and that was prior to the submission of this proposal which is dated June 14th. It must have been. At the meeting that we held with the union prior to the submission of this proposal, the question then arose as to—as I recall it now, as to the fact as to whether or not the publishers would recognize the union. The publishers stated that they would recognize the union for the purpose of negotiating a contract. At that time they had received an A. F. of L. charter, and they had been—as I stated before, had also received sanction of the San Francisco Labor Council.

Q. And there was no proposal of either party at that original meeting?

A. There was not, no.

Mr. Fink: That is all.

Recross-Examination

By Mr. Jacobs:

Q. A few more questions, if you please. Mr. Bitler, in your capacity as manager of the San Francisco Publishers Association, have you negotiated contracts on behalf of the publishers, the publishers association, with other labor unions?

A. Yes.

(Testimony of Eugene F. Bitler.)

Q. And isn't it true that in every case where there has been any dispute that the members of those unions were employees of the publisher? [80]

A. What was the question?

Q. Isn't it true that in every one of those contracts negotiated by you on behalf of the publishers and the publishers association, that the members of the union worked for the publishers, were the employees of the publishers?

A. On all the contracts except the news vendors agreement, they were all employees, yes.

The Court: Is that all from Mr. Bitler now, gentlemen?

Mr. Jacobs: No further questions.

Mr. Fink: That is all, Mr. Bitler.

(Witness excused.)

WILLIAM PARRISH

a witness for the Plaintiffs; sworn.

The Clerk: State your name to the Court.

A. William Parrish.

Direct Examination

By Mr. Fink:

Q. Mr. Parrish, what is your occupation?

A. I am a news vendor.

Q. Are you a member of the News Vendors Union? A. I am.

(Testimony of William Parrish.)

Q. How long have you been a member of the News Vendors Union?

A. Since the special meeting that was held after the organizational meeting in May.

Q. Of 1937? A. Yes, sir.

Q. Do you now occupy any official position with the News [81] Vendors Union?

A. I am the Secretary-Treasurer.

Q. How long have you been Secretary-Treasurer? A. Since October of 1943.

Q. Have you occupied any other official position with the News Vendors Union?

A. Yes, I have been business agent; I have held the office of President on two different occasions; I have been a member of three or four—I think a total of five standing committees or five negotiating committees. I have been a member of the standing committee on three different occasions, and other committees.

Q. Do you now sell newspapers in the City of San Francisco? A. I do.

Q. Have you sold newspapers in the City of San Francisco since 1937?

A. I have, and prior to that.

Q. Have you sold in cities other than San Francisco?

A. Not for any long period of time. I have sold papers in Chicago, Portland, Los Angeles, over a long period of years of perhaps a week's length, or two week's length of time.

(Testimony of William Parrish.)

Q. Mr. Parrish, were you a member of the negotiating committee the first negotiating committee of the union? A. I was.

Q. Were you a signer of the first contract, Exhibit 4 in evidence? A. I was.

Q. Did you attend the first meeting of the union negotiating committee and the publishers held on June 8th or 9th of 1937? A. I did. [82]

Q. Mr. Parrish, at that time were there proposals either on your behalf, on behalf of the union, or on behalf of the publishers before the committees?

A. We—I will have to explain that. In order to explain it I have to go back to when the committee was first formed.

The Court: Well, I am afraid we are going to get into too long drawn out an answer here. That is a simple question. The attorney wants to know, when you were on the negotiating committee, when you were talking with the Association, whether there were any proposals back and forth which you discussed.

Mr. Fink: No, at the first meeting, your Honor.

The Court: At the first meeting.

Q. (By Mr. Fink): Were there any proposals from the publishers or the union at that meeting of June 8th or 9th, 1937?

A. There was a statement made by the publishers and we had a proposal to present to them. I say a proposal; it was a preamble of the agreement.

(Testimony of William Parrish.)

Q. Now, Mr. Parrish, did the question of the relationship of the News Vendors Union and the members of the News Vendors Union and the publishers arise? A. It arose, yes.

Q. When? A. At that meeting.

Q. Was there a statement of position by the parties at that meeting?

A. There was, by both parties.

Q. By both parties. When, Mr. Parrish, was the news vendors' [83] proposal first submitted? I hand to you Defendant's Exhibit A, the 1937 proposal of the union.

A. It was probably mailed to the Publishers' Association the day before this date, which would make it—perhaps it could have been the 12th. I think we mailed it on a Saturday, if I am not mistaken.

Q. And that is a copy of the 1937 proposal of the union?

A. I would say that it was. I recognize the beginning of the agreement, anyway.

Q. Did the publishers submit a counter-proposal? A. Yes.

Q. And did the Publishers' counter-proposal contain section 1 as we know it in the contracts through the years?

A. That would be a difficult question for me to answer. I am not certain that it did, but I am under the impression that it did.

Testimony of William Parrish.)

Q. Did the negotiating committee for the union accept the principle of Section 1 of the contract of August 31, 1937?

A. The Negotiating committee had accepted that principle before they met with the publishers on either the 9th or 10th of June.

Mr. Jacobs: I move to strike as not responsive everything after the fact that they accepted. Anything further is not responsive to the question.

The Court: Well, I guess that is true. The question [84] was whether they accepted the principle that counsel calls Paragraph 1 of the agreement. I suppose you can say yes or no to that.

A. Yes, they had accepted that, your Honor, but I think it should be qualified.

Q. You mean that there were some qualifications to their acceptance?

A. I mean that the principle was accepted, of the buyer and seller arrangement, before we had ever met with the publishers.

Q. You mean you had agreed among yourselves to accept it? A. That is right.

Mr. Jacobs: I move to strike that as not responsive.

The Court: It is not responsive. I asked it and brought that down on myself. I don't see that it would do any harm. I will allow it in.

Q. (By Mr. Fink): Now, Mr. Parrish, the Court has indicated by previous rulings that it does not deem it necessary or proper to get into a detailed examination as to conversations. And bearing

(Testimony of William Parrish.)

that in mind, do you recall discussions as to the following matters: Do you recall that there were discussions of the matter of the wholesale and retail prices of newspapers?

A. Yes, and very bitter discussions.

Mr. Jacobs: May it please the Court, I understand that your Honor is not bound by what the witness calls a wholesale [85] and retail price. Subject to our objection that we do not admit that there is any wholesale and retail price of these papers, and for the purpose of the record I would like to move to strike those phrases.

The Court: Well, I think the phrases are used—I take it that they are to identify, just as a means of identifying the particular subject matters of the contract.

Mr. Jacobs: If not intended to establish that there was a purchase and sale——

The Court: Neither you nor the other attorneys are going to take away from me the right to decide this case.

Mr. Jacobs: I understand.

The Court: I am not going to be guided by the words you use in that regard, or else there wouldn't be anything for me to decide.

I think you can answer that question.

A. Yes, there were some very bitter discussions.

Q. (By Mr. Fink): In other words, the negotiating committee of the union and the publishers did not agree upon the question of prices?

A. We did not.

(Testimony of William Parrish.)

Q. And it took some considerable time before there was a meeting of minds?

A. The last meeting of the negotiating committee in 1937 answered that or finally solved that problem.

Q. Now, upon the subject of corners or outlets, did that [86] general subject matter come up?

A. It did.

Q. Was it the subject of negotiation through the period of June to August?

A. That occupied, I might say, as prominent a part in the negotiations as did the rate.

Q. You weren't of one mind?

A. Very definitely not.

Q. In the question of guaranty, did that question arise during the negotiations? A. It did.

Q. Was it a subject of discussion?

A. Also very bitter.

Q. And was there an immediate meeting of minds on that subject? A. No.

Q. Mr. Parrish, reverting now to the wholesale and retail prices as provided for in the contracts, have there been changes in those prices since the original contract of 1937? A. Yes, there have.

Q. Have new wholesale prices been negotiated?

A. Yes.

Q. Have the prices of the street corner sales of the Sunday papers been increased since 1937?

A. They have.

Q. How many times? A. Twice.

(Testimony of William Parrish.)

Q. From what to what, first?

A. The first instance was from ten cents to twelve cents, was the retail price, and the wholesale price from 7½ to 9 cents.

Q. Then there was another change, was there, from 12 cents to something else?

A. From 12 to 15 cents.

Q. And was that change in the price negotiated with the news vendors?

A. Why, certainly; it had to be. [87]

Q. The Sunday newspapers didn't arbitrarily raise the price without negotiating a new wholesale price with you?

A. They can't. They would have no more right to do that than we would.

Q. Do you remember the dates of those negotiations? I mean on the raises in the Sunday papers?

A. I don't remember the exact dates; I could possibly find them for you and have them tomorrow morning.

Q. Thank you. Now, this general question, Mr. Parrish: Following the 1937 negotiations, have the news vendors ever discussed between themselves the subject matter of relationship?

A. There has been instances.

Q. Has the News Vendors Union ever taken any action other than to support the buyer and seller relationship?

Mr. Jacobs: Objection; I do not think it is material whether they took any action or not. Further-

(Testimony of William Parrish.)

more, it is contradicted by the evidence already in Defendant's Exhibit A and Exhibit 44.

The Court: What point of time are you talking about now? You didn't specify any time.

Mr. Fink: No, your Honor, I asked it as a general question. I will withdraw it and reframe the question.

Q. Has the News Vendors Union ever voted upon the subject of the relationship problem?

A. I can recall only one instance where such a vote was taken, which in one sense [88] of the word wasn't a true vote.

Q. And that was when, Mr. Parrish?

A. That was prior to the beginning of negotiations in 1938.

Q. And do you know the result of that vote? Do you recall the result of that vote?

A. The report of the negotiations committee was approved.

Q. And that report was what?

A. Was that we ask the publishers for recognition as employees.

Q. And they did submit an employee proposal in 1938? A. Yes.

Q. And, Mr. Parrish—I know this is going to produce an objection, your Honor—can you state why there was an employee proposal made by the union in 1938?

Mr. Jacobs: He anticipates correctly there. There certainly is an objection.

Mr. Fink: We knew that.

(Testimony of William Parrish.)

The Court: I don't see why, what the reasons for doing something that was done, how they are material.

Mr. Fink: Your Honor, I don't want to waste a lot of time on it, either, but I want to submit this observation to you. There is a lot of jockeying in negotiations. I don't know; I suppose you in your experience have been through it. There was a particular reason for their presenting this employee proposal.

The Court: Yes, but it wouldn't help me to decide the [89] question. Maybe they thought that that would be a kind of a club that they could withdraw and then get something else that they wanted.

Mr. Fink: That is exactly it.

The Court: I know what you are getting at.

Mr. Fink: That is exactly it.

The Court: But that isn't going to help me to decide this case.

Mr. Fink: I will withdraw the question.

Q. Mr. Parrish, other than that one instance of 1938 the matter of the relationship has never again been before the union?

A. When you say the matter of relationship and mean, has the question of buyer and seller ever been taken to a vote, you are perfectly right; it has not.

Mr. Fink: May I have the answer read? I missed a part of it.

(Testimony of William Parrish.)

The Court: He says in substance: If you are referring to the buyer and seller relationship having been put to a vote of the union, it has not.

Mr. Fink: Thank you.

Q. Mr. Parrish, in consideration of the 1937 contract which was signed on August 31, 1937, was the contract, the full contract, thereafter submitted to the union? A. Yes.

Q. Was it considered by the union?

A. Yes; and for [90] the information of the Court, one thousand copies of that was run off on a mimeograph machine on the Saturday night prior to the meeting by the negotiating committee, and each member of the union had a copy of it to peruse while it was under consideration.

Q. How did the union proceed in its consideration of the contract. A Section by section.

Q. Was Section 1 of the contract explained and discussed at that union meeting?

A. I would say that every section was discussed. It took two meetings to handle that.

Q. Were the other sections of the contract separately read and separately discussed.

A. Each section of the contract was separately read and separately discussed.

Q. Did the union finally approve the contract as adopted by the negotiating committee?

A. They did.

Q. And the publishers? A. They did.

(Testimony of William Parrish.)

Q. Do you happen to remember the vote by which the contract was approved?

A. I think or believe that the vote was around 7 or 8 to 1. I have it in the original minute book of the union, which is on the desk there by Mr. Ladar.

Q. Now, were you a member of the 1939 negotiating committee? A. I was.

Q. Were you a member of the 1944 negotiating committee? A. I was.

Q. I notice that you are not a member of either the 1940 or [91] 1942 committee.

A. That is incorrect. I was a member of the 1940 committee, and prior to the presentation of the proposal of the union to the publishers I submitted a minority report. Upon the failure of the union to adopt that report, I withdrew from the committee.

Q. What did your minority report concern?

A. It concerned the guaranties, hours of sale, and one other matter; I think that had some concern with racks.

Q. By the way, Mr. Parrish, the union at its inception was interested in the subject of competition. Will you explain that to the Court, what competition did the union vendors have?

A. We had lots of competition—competition by boys in some instances; competition by racks; other instances competition by the fact that there were too many vendors selling papers on the streets of the City and County of San Francisco.

(Testimony of William Parrish.)

Q. And it was your objective to reduce that competition? A. Certainly.

Q. Do the profits of the other vendors increase as the competition is diminished?

A. That is right.

Q. Let me ask you this question, Mr. Parrish—and I have in mind the entire five contracts—can you give us an indication, or give the Court an indication of the number of vendors who make in excess of the guaranty profit appearing in the contracts? [92]

Mr. Jacobs: Let us have that first confined to a certain period before I consider any further objections. I didn't hear any point of time in the question.

Mr. Fink: There isn't any. It is a specific subject. There wasn't any.

Mr. Jacobs: I will object to that unless it relates to the taxable period.

Mr. Fink: I think the latter part of that is perfectly good. I think I should relate it to the taxable period. The taxable period, if your Honor please, runs through the contract or up into the contract of 1939. It runs into three contracts; it runs into the 1940 contract.

Q. Having in mind, Mr. Parrish, the 1937, the 1939 and the 1940 contracts, can you give us some estimate or some approximation of the number of your members who have profits in excess of the guaranty?

(Testimony of William Parrish.)

Mr. Jacobs: Objection, your Honor; in the first place, the main point of the objection is that the best evidence of what vendors did or did not make the minimum guaranty is the books and records of the publishers.

The Court: I suppose that is true. Do you want to prove this with some particularity, or are you just making some general observation?

Mr. Fink: I am trying to get a picture of just what it means with the membership, your Honor; I am not trying to [93] pursue it with particularity. If the witness knows, I want to get an approximation of the number of vendors who make in excess of the guaranteed profit. There is no intent of pursuing it. We would be here until July 4th of next year if we went into it with every vendor.

The Court: Do you object to it on that point?

Mr. Jacobs: I would like to have a figure too, your Honor, but I want to see an accurate figure rather than an estimate of this witness.

The Court: Well, I think that the objection is really good, Mr. Fink. I think what you are getting at is, you want to know whether there is any substantial number that make over the guaranty; whether there is a greater number that make over the guaranty than those who just make the guaranty; is that what you are getting at?

Mr. Fink: That is it.

The Court: Some general condition?

Mr. Jacobs: I would like to have that information myself, and I think the Court should have that information, but I think it should be accurate.

(Testimony of William Parrish.)

The Court: If that is the case, the objection that it is hearsay is good, unless there is some record.

Mr. Fink: I am perfectly willing to get at it another way. If your Honor please, I thought that we might shorten it. This gentleman, I think, knows. He has been in an official [94] position with the union and he knows what the facts are.

Q. By the way, reverting to the 1937 contract, was the subject matter of hours of selling introduced at the negotiations? A. Yes.

Q. And was it some time before there was a meeting of minds? A. Quite some time.

Q. You finally crystalized on a mutually agreeable period? A. Yes.

Q. By the way, you described the manner in which the 1937 contract was considered by the union. Were the contracts of 1939, 1940 and 1942 and 1944 considered in the same manner?

A. No, we did not in 1939 and 1940—and I imagine in '42, although I wasn't in San Francisco at the time—nor in 1944 every member didn't get a copy of it.

Q. Was that the only difference?

A. That is during the time of the consideration. Immediately after adoption we had copies drew up—that is, printed.

Q. The subsequent contracts were all considered section by section, were they?

A. That is right.

Q. Was each one of those subsequent contracts ratified by the union? A. They were.

(Testimony of William Parrish.)

Q. Mr. Parrish, how do newspapers reach the vendors for sale on the streets?

A. They are delivered to them to, oh, 99 per-cent of the corners, by wholesalers.

Q. You mean men who drive automobiles that are loaded with [95] papers make the actual delivery? A. That is right.

Q. Do these wholesalers deliver more than one edition to the various vendors? A. Yes.

Q. Do you see the wholesaler again after he delivers an edition until he comes around with another edition?

A. He might possibly drive back by a corner at which you are selling on his way back to the plant.

Q. But he doesn't stop at all? A. No.

Q. Do you contact or are you contacted by any other employee of the publishers except the wholesalers?

A. I don't believe so. I mean, speaking for myself personally as a vendor.

Q. You have sold papers in San Francisco upon many corners, isn't that correct?

A. That is right.

Q. Is that true of your selling experience?

A. It has been, yes.

Q. You are not contacted by anybody but the wholesaler?

Mr. Jacobs: He said he didn't believe so; he didn't say he wasn't.

A. I qualified that to speaking for myself personally as a news vendor.

(Testimony of William Parrish.)

Q. (By Mr. Fink): Now, Mr. Parrish, after the papers are delivered to you, what do you do?

A. Offer them for sale.

Q. Well, how do you offer them for sale? [96]

A. Personally, I stick them under my arm and stand out there at 19th and Lincoln Way on that island, and whenever a car stands I ask them which they want, if they say the Examiner I give them the Examiner, and if they want a Chronicle I give them a Chronicle.

Q. Do you do that in any manner?

A. It so happens there is only one manner to do it.

Q. Does anybody tell you how you must offer the paper? A. No.

Mr. Jacobs: The question has been asked and answered; he says there is only one manner in which it can be done.

The Court: I will allow it. You aren't given any directions, are you, as to how you shall sell the papers? A. No.

Q. (By Mr. Fink): Are you told how you are to hold the paper? A. No.

Q. Are you instructed as to your manner of delivery of the paper to the purchaser?

A. No. The delivery of the——

Q. How is that?

A. I would like to have that question again.

Q. Well, are you instructed as to the manner in which you are to deliver the paper to your customer?

A. You mean hand the paper to them?

(Testimony of William Parrish.)

Q. Yes. A. No.

Q. Who determines the number of papers that you take, Mr. [97] Parrish?

Mr. Jacobs: That calls for his conclusion.

Mr. Fink: Just a minute, please. I am slow, I know, but let me get it out.

Mr. Jacobs: I apologize.

Q. (By Mr. Fink): Who determines the number of papers that you order each day or each edition, Mr. Parrish?

Mr. Jacobs: Objected to as a conclusion, who determines.

The Court: I will overrule the objection.

Q. (By Mr. Fink): You may answer under the Court's ruling.

A. Well, I order the number of papers that I feel that I can sell.

Q. Does anybody tell you how many you must take?

A. No, but I will qualify that by saying this: that the corner at 19th and Lincoln Way is an established corner and has been, and over a period of time approximately the same number of papers are sold on the first edition night after night. There are some changes, possibly due to heavy rain or perhaps a better story breaks—that is, a big story, that would cause a difference in the amount of papers that you would get. I receive on the first—what they call a runner—that is, a wholesaler who has no connection with the vendor except to bring the first edition or part of the first edition to him,

(Testimony of William Parrish.)

he drops fifty papers on the corner, then he goes on around and he drops papers to the stores. [98] I believe he is a store delivery man. Now, I get that fifty brought; I do not order it; it is not a question of ordering; it is, you might say, a starting amount, so that I will have my papers around the approximate time that I can begin selling. Otherwise, if I had to wait for the regular wholesaler, to arrive at the corner, it would mean that I would lose approximately forty-five minutes selling time, which would be a loss to me.

Q. And then, after that period, you order the number of papers which you determine that you can sell? A. That is right.

Q. Do you pay for all the papers that you order?

A. I check in on the delivery of the last edition.

Q. What do you mean by check in?

A. Well, I pay for all the papers that I am charged with that day.

Q. And what is the manner of payment? How do you pay? Do you pay in cash?

A. Certainly.

Q. And that is true as to all papers taken by you?

A. With the exception of Saturday night.

Q. Do you have a return privilege?

A. I did.

Q. And do you sometimes return papers?

A. Quite often.

(Testimony of William Parrish.)

Q. And do you get credit for them?

A. Yes.

Q. So that you pay for the difference between the number that you have ordered and the number that you return, is that [99] correct?

A. That is right.

Q. You pay in cash every day?

A. Pay in cash.

Q. Do you ever sell papers on credit?

A. So far no one has asked for it at 19th and Lincoln Way.

Q. Did they at any other corners that you sold?

A. Oh, yes.

Q. By the way, you are talking of 19th and Lincoln Way. You are selling there at present, is that true?

A. That is right.

Q. Then, take the corner that you were selling during the taxable period 1937 to 1940, did you ever have occasion to sell to men on credit?

A. I sold papers on credit at the S. P. Depot, and I had, I think, seven weekly customers.

Q. Did you ever have a loss on any of them?

A. There has been losses.

Q. Who bore the loss? A. Me.

Mr. Jacobs: Object to this line of testimony; the so-called credit that might have been offered by this witness is immaterial and irrelevant as to what he does with the papers in that respect.

The Court: Well, I will allow the answer to stand.

(Testimony of William Parrish.)

Q. (By Mr. Fink): By the way, have you ever had papers stolen? A. Yes.

Q. Who bears the cost of papers that are stolen?

A. I do. [100]

Q. You pay for them if they are stolen?

A. I will qualify that. If papers are delivered to the corner which I have a contract to sell at prior to the time which I am to begin selling, under the terms of that agreement I only pay for the number of papers that I find on the corner when I arrive. Now, all the papers that are delivered after I arrive, if I leave the corner for any reason whatsoever and I leave a hundred papers there and somebody stole them, that is just my tough luck.

Q. Do you receive any orders from the wholesalers? A. No.

Q. That call upon you? A. I haven't.

Q. Do you receive orders from anyone else connected with the papers for which you sell?

A. I haven't.

Q. By the way, what papers have you sold during this period that you have described?

A. Well, I have sold the Call; I have sold the Examiner; I have sold the Chronicle, and I have sold the Chronicle and the Examiner.

Q. You have quite a wide variety. Eliminating the wholesaler, do you receive orders from anyone else connected with the publisher? A. No.

Q. How are corners or sales outlets allocated to the vendors?

(Testimony of William Parrish.)

A. A great many of the corners have been in, you might say, possession of the vendors over a period running from ten years up to as high as twenty or twenty-five years. Other [101] corners that vendors have obtained under the agreement since 1937, from 1937 to the assigning of the agreement in 1939, whenever a corner became vacant any vendor had the right to apply for that corner and if he was in good standing he was given a contract for that corner. In 1939 we changed that condition—that is, during the 1938-39 negotiations we changed that particular section of the contract, and contracts were let through the office of the union. The publisher notifies the union of a vacancy, and the union gives to the publisher a list of available people; then the publisher selects from that list the person to give a contract to for that corner. That was the way the thing started out. It hasn't worked out that way.

Q. How does it actually work?

A. Well, as a matter of practical——

Mr. Jacobs: I would like to have the question identified in point of time. It is a very important question.

The Court: When you say, "It isn't the way it has worked out," what period are you referring to?

A. After about, I would say, two or two and one-half months after the 1939 contract was signed, your Honor.

The Court: Go ahead.

(Testimony of William Parrish.)

A. We found that the union at all times knew of vacancies prior to the time that the publishers did. The reason for that principally, with the exception of those corners that [102] became vacant the night before, would be that, for instance, the Examiner and the Chronicle, the street man—the street man is a different person from the circulation manager—generally doesn't arrive at the plant until about, oh, an hour before press time. That is the time the papers start to roll.

Well, in order for the vendor to notify the street man that he wasn't going to be there, he had to wait until that particular time. Now, it might be that during the course of the day this particular vendor would want to leave town or go somewhere. He could always get the office of the union, and as a practical matter we found, and the publishers agreed, that there was one requirement in the contract or one section of the contract which called for the vendor to notify the publisher whenever he was unable to sell any day or night, and as a matter of practical operation, we agreed that he would notify the union and then the union, in turn, would notify the publisher that the corner was vacant. And that has been the practical operation since about that time.

Q. (By Mr. Fink): And has that resulted in a difference in the allocation of the individual vendor to the individual corner?

A. I don't quite understand the question.

(Testimony of William Parrish.)

Mr. Jacobs: I didn't understand the question myself.

Mr. Fink: I will withdraw it and start again.

Q. Has this modification that was agreed upon resulted in [103] any change in the actual placing of news vendors on corners from the original scheme?

A. With the exception of the fact that it makes it more convenient, and then you must realize that—I know that there is only three of the newspapers concerned here, but there are four newspapers in San Francisco, your Honor, and each one of them has a different street man and each one of them's idea of how he is going to run the street, you might say, differs.

While I was business representative of the union I can remember no more than three occasions where the Call-Bulletin selected anyone for any corner that was vacant.

Q. (By Mr. Jacobs): What period was that, Mr. Parrish, please?

A. That was 1939-40. I can recall at no time that Tony Baccoccio—I would call him up and say "I have got a corner vacant"—or various corners vacant.

"Got anybody up there?"

"Yes."

"Fill them."

There has been an occasion where that was done on The News. There has been other occasions where The News selected the vendor.

(Testimony of William Parrish.)

Now, you have a different problem on the Examiner and Chronicle than you have on the Call and News. And I might say that during the years which apparently we are concerned [104] with here, the Examiner and Chronicle was consolidated about 98 per cent, your Honor.

Mr. Fink: The word "consolidated" there, your Honor, means one vendor selling both papers.

A. That is what we call a consolidated corner. And I don't know whether the publishers didn't trust each other or not, but they divided up the period of time when the selection for contracts would be utilized by the two papers. I think it started at the Examiner and Chronicle—or the Examiner, rather, first took the first six months, or they took the period of time up until July 1st, I believe, and then the Chronicle took over July 1st to January 1st, and that has been the practice since then. But with this understanding; that if the Examiner was doing the selection for contracts, the Chronicle was paying off guaranties, if any.

Q. Mr. Parrish, do vendors sometimes lose their locations or corners?

A. Yes, for breach of contract.

Q. What is that?

A. For breach of contract.

Q. What is that?

A. For breach of contract.

Mr. Jacobs: I move to strike out his volunteer statement in the nature of propaganda. Let him confine the answer to the question.

(Testimony of William Parrish.)

The Court: Yes; "for breach of contract" may go out.

Q. (By Mr. Fink): The fact is that vendors sometimes do lose their contracts or outlets, is that correct? A. Yes. [105]

Q. What are the reasons why a vendor will lose his contract, just generally?

A. Drunkenness, failure to check in, failure to show up on the corner.

Q. Those are the general causes?

A. Yes; it is failure, you might say, to carry out the terms of the agreement.

Q. Are the news vendors dismissed by the publishers?

A. I don't know whether you would use the word "dismissed" or not. They lift the contract that the vendor possesses, whether it happens to be written or oral.

Q. Is there a discipline procedure that the union has of its own? A. Yes.

Q. Do you discipline members for drunkenness? A. We do.

Q. On the corners? A. We do.

Q. Do you discipline men for not showing up on the corners? A. We do.

Q. Do you discipline men for not paying their bills? A. We do.

Q. Do the publishers have anything whatsoever of any kind or character to do with that discipline? A. They do not.

(Testimony of William Parrish.)

Q. Do the wholesalers discipline vendors?

A. The wholesalers have absolutely no standing under the agreement which we have with the publishers.

Mr. Jacobs: I think I would rather have the Court [106] interpret that agreement than the witness.

The Court: I think that is right. The answer may go out. You may ask him for an actual situation.

Q. (By Mr. Fink): Well, do you know of any instances where wholesalers have disciplined the vendors?

A. There has been situations where it was done. As a matter of fact, here some few months ago we had a wholesaler fired for doing that.

Q. It doesn't happen except occasionally?

A. Human nature is human nature. Mexican generals, you find them everywhere.

Q. When it does happen, what does the union do about it?

A. We take it up with the publishers.

The Court: I think you are being unfair to the Mexicans in singling them out.

The Witness: I agree with you, your Honor.

The Court: It applies all over, doesn't it?

Q. (By Mr. Fink): What do you mean when you say you take it up with the publishers?

A. Well, under the agreement there is one person——

(Testimony of William Parrish.)

Mr. Jacobs: I must ask the Court to strike everything under the agreement. I again repeat that I think it is the province of the Court to interpret the agreement.

The Court: Yes, I think that the objection is good. Just read the question, Mr. Reporter. [107]

(The reporter read the last question.)

Mr. Fink: I withdraw the question.

The Court: I think that is a little indefinite.

Q. (By Mr. Fink): Is there a procedure by which the union contacts the publishers?

A. Yes. The publishers have a set-up, and it is part of the agreement, whereby on the Examiner one person is designated by the publishers wherein the first instance complaints on the part of the members against the publishers or their agents, or complaints on the part of the publishers against the union, are discussed.

The Court: Isn't he reciting now one of the provisions of the contract?

Mr. Fink: I think, your Honor, he is probably overstepping your ruling, but I think he is trying to relate it to an individual instance and explain what happened.

Q. Are you trying to tell us what happened, or are you trying to interpret the contract?

A. No, there is no interpretation; it is in plain English.

The Court: Well, that is what I was afraid of. I think what Mr. Fink wants to know is for you to

(Testimony of William Parrish.)

state practically what happens, if there is some complaint, whom do you see and how do you go about it?

The Witness: Your Honor, I will give you a concrete example.

The Court: All right. [108]

A. At the corner of Geary and Taylor Mr. McNamee has a contract to sell Examiners and Chronicles. At eight o'clock at night the wholesaler comes by and he gives him 150 papers, and Mr. McNamee says, "I only want a hundred." The wholesaler says, "Take the 150." And Mr. McNamee throws fifty back in the car and says, "I don't want them."

Mr. McNamee, as soon as possible, gets in touch with Mr. Kalock, who is the business agent of the union. Mr. Kalock, as soon after as possible, gets in touch with Mr. Campbell who is the street man and is the person who is designated by the Examiner to settle, in the first instance, beefs such as that, and then the matter is adjusted between Mr. Kalock and between Mr. Campbell.

Mr. Jacobs: I want the Court to appreciate that this is all hearsay. I am not making the objection when it is a question by the Court.

The Court: I am learning something now about how the business goes on.

Have you got much more direct examination?

Mr. Fink: Yes, your Honor. I have considerable further direct examination.

The Court: Well, I think maybe we might adjourn at this time.

(Testimony of William Parrish.)

Do you think we are going to finish this case tomorrow?

Mr. Fink: Finish it tomorrow, your Honor? Was that [109] your question?

The Court: Don't look so astonished at me. I was told that the case was going to take two days.

Mr. Fink: If your Honor please, I am perfectly serious when I say from indications this case probably will run to this time next week. You don't set any trial on Monday, do you?

The Court: No. Well, unfortunately, I have been doing it for two or three years now.

Mr. Fink: On Monday?

The Court: As soon as I get through with my law and motion calendar I am trying some case the rest of the day. The first year I was able to have some time in chambers on Monday afternoon, but not in the last couple of years. That is the only way I can try some of the shorter cases.

Mr. Fink: I am perfectly serious when I say that we will be lucky if we finish this case by a week from today.

The Court: Why do you have to have so much time on this case?

Mr. Fink: If your Honor please, I am in part basing that on what I apprehend will be done by the defendant, and I am giving myself this advantage: that at an appropriate time I propose to tender a stipulation to the attorney for the defendant, which, if he doesn't accept, will prolong the trial. [110]

(Testimony of William Parrish.)

The Court: Would you mean by that that you are going to have a lot of cumulative evidence?

Mr. Fink: If your Honor please, there are three newspapers involved. The operation on each one of the three newspapers is identical with the exception of minor differences which in no wise relate to the main question that we are here to solve. I take it that if the stipulation which will be tendered is not accepted, I will have to put on evidence for each one of the three papers.

The Court: Well, after you have once described for me—you have before me the contract, and you have described the method of operation as this witness has described it, what else is there for me to have before me factually to determine this question? I am not speaking technically, going to complete your record as to each newspaper, but what additional evidence?

Mr. Fink: You haven't heard yet from the publisher. We haven't offered a publisher as yet.

The Court: Are they going to testify any differently than this witness? They are not going to contradict him, are they?

Mr. Fink: If your Honor please, I think that there will be some differences, but there will be no contradictions. There will be some differences and there will be a description of operations.

The Court: That shouldn't take long, should it? When [111] you say the case is going to take a week——

(Testimony of William Parrish.)

Mr. Fink: Well, you asked me, your Honor, what my judgment was, and I have given it. I think we will be here this time next week unless the stipulation which I propose to tender is accepted by the defendant.

The Court: Well, maybe we should have had a pretrial conference in this case.

Mr. Fink: No, the issue is right down to bed-rock as I see it.

The Court: I may stop the trial if that is the case and have a pretrial right now, because I am not satisfied that a case with the issue that has been stated to me to be involved here should take that long, and there are other cases and other litigants who, of course, have an equal if not a prior right to the consideration of the judicial time, and under our rules of procedure that is one of the powers that the Court has. That is why I asked you that question. I don't see that there is any necessity for that sort of thing and for that length of time, and if you think that you gentlemen aren't going to be able to avoid cumulative testimony, why, then I will proceed with the pretrial tomorrow morning, and have an agreement as to just what is going to be produced.

Mr. Fink: May I say that, of course, I know some of the things that the defense has done. I understand, for instance, [112] that they have issued fifty subpoenas. If they submit fifty witnesses here and they produce the carloads of written material that they have asked for, why, my estimate

(Testimony of William Parrish.)

will be exceeded and not diminished. I will say to the Court I will present a total of five witnesses, after which I will tender the stipulation.

As far as the pretrial conference is concerned, I have no objection to it, but nothing will be accomplished from it because we have got the issue down to as narrow as it can be.

The Court: Of course, the Court has the inherent power to refuse to hear cumulative evidence.

Mr. Fink: That is true.

The Court: I don't just have to sit and listen to a repetition of the same thing.

Mr. Fink: That is entirely true.

The Court: Particularly if there is no dispute. I can't see how there can be any dispute as to the manner of operation and the sale of the papers.

Mr. Fink: I am in complete agreement with the Court. I can't either, but the defendant seems to think there is.

Mr. Jacobs: I made no such statement. At the outset of this case Mr. Fink said—I think I quote him correctly—that there is a great deal of that to be taken up in argument. At that time I urged that the Court consider my motion, because I said the contract contains the basic agreement. [113]

I can tell the Court now that I am not going to stipulate that every one of the other papers runs their paper in the same way that Mr. Fink's most able witnesses said that they run that. I would not be performing my duty, representing the Government, if I entered into such a stipulation.

(Testimony of William Parrish.)

The Court: Well, you gentlemen think over the matter, and each of you make some statement in the morning the first thing as to the nature of the evidence that you are going to present, and then we will see from that whether we can come to some agreement as to the trial. I mean what witnesses you are going to present, what those witnesses are going to testify to, because it may be that upon the statement of counsel as to what the witnesses are going to testify, it won't be necessary to present them. That is in your interests as well as, of course, in the interest of the Court, as far as time is concerned.

I pretty much understand what this case is about now—that is, in general. I haven't heard all of the evidence, but I can see what the issue is, and it almost seems to me as if it could be submitted on an agreed statement of facts.

Mr. Fink: On an agreed statement of facts? We are so far apart, if your Honor please, we couldn't——

The Court: As to the manner in which the newspapers are delivered to the men, and how much money they get, and what they make. [114]

Mr. Fink: We couldn't get together on an agreed statement of facts, your Honor, we are so far apart.

The Court: I almost think you could. This is about the third or fourth one of these cases that I have had recently under the Social Security Act. It is always a question of law. The question is, whether

(Testimony of William Parrish.)

these gentlemen, such as Mr. Parrish, are employees or whether they are independent contractors, and that depends upon the contract and upon the manner in which the contract is performed in fact.

Mr. Fink: I say, your Honor, it is a mixed question of law and fact. I do not concede that is a question of law at all; I believe it is very, very much a question of law and fact.

The Court: Of course, that is true of many cases. When you say it is a mixed question of fact and law, you don't really mean that there is any dispute—there can't be any great dispute.—as to the facts in this case.

Mr. Fink: If your Honor please, I do make that assertion seriously to you that there is a dispute as to the facts. The Government has held an administrative hearing on this already and the facts are directly in issue. We are as far apart as the two poles on the facts.

The Court: Do you mean that one witness has testified that the newspapers are sold in a certain manner and another witness testified directly to the contrary? [115]

Mr. Fink: If your Honor please, I am not going to try to tell you what the defendants' witnesses are going to testify to. I don't know. I do know that their assertion is that it is contrary to my witnesses. I do know that to be the fact.

The Court: I think that they will probably disagree with you on the statement of the witnesses that they are independent contractors, because that

(Testimony of William Parrish.)

is the issue of the case, but what the parties actually do in carrying out the contract, I don't think there could be very much in dispute.

Mr. Fink: Your Honor, I can name several instances where there is a disagreement on the factual side. For instance, the very fundamental question of control. They will, I assume, present evidence to you that they believe indicates control. Now, how are you going to get the picture on that?

The Court: That may be. On that matter there might be some conflict, perhaps.

Well, we will sleep over it a little bit and talk about it again in the morning at ten o'clock.

(Thereupon an adjournment was taken until Friday, March 29, 1946, at ten o'clock a.m.)

Friday, March 29, 1946, 10:00 A.M.

(Same appearances.)

WILLIAM PARRISH

recalled.

Direct Examination

(Continued)

By Mr. Fink:

Q. Mr. Parrish, yesterday you testified concerning the payments for papers by you daily. How are those papers charged to you?

A. There is two methods of charging the papers, the method of charging on a daily basis, or the method of charging them on an edition basis.

(Testimony of William Parrish.)

Mr. Jacobs: I am sorry, Mr. Parrish, I did not hear the last.

A. An edition basis. In other words, the publishers' representative, the wholesaler can collect under the terms of the agreement after each edition, or at the end of the selling period.

Q. (By Mr. Fink): Do they charge the papers to you at a 100 copy basis? A. That is right.

Q. I hand you a printed form. Is that a form used in the distribution of the papers?

A. This particular form here, I am not certain whether it is being used at the present time or not. It was a form which was designed to take care of a [117] situation which arose.

Mr. Jacobs: Before the witness testifies, may I see it, so I will know what he is talking about?

Mr. Fink: Certainly.

Q. Now, Mr. Parrish, is this the form that you referred to yesterday, I think, in your testimony as a sales slip? A. That is right.

Q. And that is used in the accounting between the vendor and the wholesaler. Is that correct?

A. Yes, it is the recognized record of sales.

Q. You get a copy of this slip at the end of each edition, or the end of each day. Is that correct? A. At the end of each day.

Mr. Fink: I would ask, if your Honor please, that that form, to complete the record, be introduced in evidence and be given the next number.

Mr. Jacobs: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 46 in evidence.)

(Testimony of William Parrish.)

Q. (By Mr. Fink): Now, at what price do you sell the papers?

A. The retail price established by the agreement.

Q. For daily papers that is what?

A. Five cents.

Q. For Sunday papers it is what?

A. Fifteen cents.

Q. Now, what becomes of the difference between the price at which the papers are sold to you per 100 copies and the retail [118] price at which you sell them?

Mr. Jacobs: May it please the Court, I don't want to interrupt the testimony, but all this is covered expressly in the contracts already in evidence. If the Court is interested in saving time, I think this testimony serves no useful purpose.

The Court: Is there any conflict about the fact that the papers are sold at prices specified in the contract?

Mr. Fink: If your Honor please, yes. At least upon two or possibly more occasions yesterday Counsel for the defendant denied that there was such a thing as a wholesale and retail price, and I am certain the Court will remember that observation in at least two instances, possibly more.

Mr. Jacobs: And we still deny it. My point is that the testimony does not make or unmake the law, whether there was a sale or not.

The Court: I don't quite follow you on that.

Mr. Jacobs: Yesterday we asked the Court to note that we did not admit there was a sale of papers

(Testimony of William Parrish.)

and moved to strike the reference to wholesale and retail prices because we do not admit, as plaintiffs contend, that papers are sold to the vendor. In the last analysis, we said, that even if they are sold, it is still an employment relationship. We don't admit that this witness or any other witness can say when papers are sold to the vendor. The terms of the contract [119] cover that.

The Court: He is testifying what is being done.

Mr. Jacobs: Yes, but he is referring now to wholesale and retail prices. That is something for the decision of this Court, not this witness.

The Court: That is just what Mr. Fink is asking about.

Mr. Jacobs: I withdraw the objection.

Mr. Fink: Will you read the question.

(Question read by the Reporter.)

A. I retain it as my profit.

Mr. Jacobs: Does your Honor understand my point? I move to strike the phrase "keep it as my profit." We don't admit it is a profit.

The Court: But a man can testify that somebody brings him a paper, he pays the man who brings it so much money, and he sells it to someone else for so much.

Mr. Jacobs: And keeps the difference.

The Court: That is what he is testifying.

Mr. Jacobs: He went further; he called it "profit."

The Court: How it is designated, that is a matter for your argument.

(Testimony of William Parrish.)

Mr. Jacobs: That is my only point, your Honor.

Q. (By Mr. Fink): Mr. Parrish, after the papers are delivered to you by the wholesaler, are you free to do what you want with these papers?

A. Yes.

Q. Can you give them away if you want to?

Mr. Jacobs: Objection. That is contrary to the provisions of the contract. The contract especially requires all unsold papers to be returned to the publisher.

Mr. Fink: Read that section. It does not say anything of the sort.

The Court: What section is it?

Mr. Fink: It says they "may" be returned.

Mr. Jacobs: Paragraph 14 (a) of the 1937 agreement.

Your Honor will note it says:

"All unsold papers shall be returned in accordance with the requirements of the Publisher."

The Court: Now, aren't you trying to vary the terms of that agreement?

Mr. Fink: Your Honor, I am trying to show what actually happened. If there is an executed oral agreement between the parties, I say it is perfectly good as a modification of the agreement.

Mr. Jacobs: I submit that is in direct violation of the parole evidence rule.

Mr. Fink: If there is an executed oral agreement as between the parties as to what their actual practice was, what they actually did, the master con-

(Testimony of William Parrish.)

tract which is not the contract, as we will show in a minute under the examination here. [121]

The Court: Your question was, he can do anything he wants with them?

Mr. Fink: That is exactly right.

The Court: I think the objection is good to that question. That is directly contrary to the provisions of the contract.

Q. (By Mr. Fink): Mr. Parrish, I hand you a printed form. Do you recognize it? A. Yes.

Q. What is it?

A. It is the contract between the individual vendor and a publisher.

Q. And were those contracts in use in San Francisco? A. Yes.

Q. How long were they in use?

A. I cannot be definite on this, but I believe that some time, either in late 1938 or early 1939, the Union reached an agreement with the publishers that it would be no longer necessary to put out the printed form of contract. That oral contracts on the basis of this would be given, to my best recollection.

Mr. Fink: If your Honor please, I ask that there be introduced and given the next consecutive number, the contracts that were just identified by the witness.

Mr. Jacobs: No objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 47.)

(Testimony of William Parrish.)

Mr. Fink: Your Honor, may I state for the record, rather [122] than reading Exhibit 46, it is merely an accounting slip between the publisher and the wholesaler and the vendor, for the purpose of the record I desire to read into the record Plaintiff's Exhibit No. 47, the News Vendors contract.

"The undersigned publisher and news vendor hereby agree that said news vendor shall sell at the corner designated below in accordance with the terms of the contract between San Francisco Newspaper Publishers Association and the News Vendors Union No. 2769, American Federation of Labor, date.....

.....
Publisher,
.....

News Vendor."

The Court: That does not seem to be exactly the language of the form attached to the complaint as I have read it. The form attached to the complaint is supposed to be a copy of that?

Mr. Fink: If your Honor please, there is not a form attached.

The Court: Yes, it is attached to your complaint as Exhibit 3, which is a copy of the agreement, the master agreement, and the last page of that is the contract referred to, but it does not seem to follow that language.

Mr. Fink: No, if your Honor please, this was the individual contract which was in use.

(Testimony of William Parrish.)

The Court: The form of contract which you attach to the complaint is not precisely in that language. [123]

Mr. Fink: May I have Exhibit 4, please?

The Court: That is in the copy I am reading; in case No. 25230.

Mr. Fink: Yes, your Honor, it is attached and is slightly different. However, that card is what was used.

The Court: Very well.

Q. (By Mr. Fink): Now, Mr. Parrish, under your selling contract in 1937 and subsequently, did you always—I will withdraw that.

Mr. Parrish, under your selling contract in 1937 and subsequently, were you free to do as you wanted with the papers?

Mr. Jacobs: An objection, your Honor. That is provided for by the contract. It is the same question stated before.

The Court: I will sustain the objection.

Q. (By Mr. Fink): Mr. Parrish, did you always turn in all the papers that you had unsold?

Mr. Jacobs: The same objection, your Honor. It is immaterial whether he did or not. It is one provision of the contract that the publisher could require him to. It is the right of the party, not what he did in that respect, that is the vital thing.

The Court: I think Counsel's point is good. I will sustain the objection.

(Testimony of William Parrish.)

Mr. Fink: Well, may I be heard a minute, your Honor, on [124] that? One of the pertinent objections to the relationship here is that the news vendor is not a free agent, that he may not—let's put it the other way, that there is no completed sale. We contend that there is a completed sale, and we are prepared to show by this witness that there is a completed sale and that all the newspapers are delivered to him to do precisely what he wants with them. If he wants to take and throw them in the Bay, then pay for them.

The Court: Well, I understand what you are getting at, but the rights of the parties are measured by what was agreed to. If one party does not carry out the terms of the contract, that does not vitiate the rights granted by the contract itself.

Mr. Fink: If your Honor please, I am addressing myself to the individual contract of the vendor. That is different from the master contract.

The Court: No, because the individual contract specifies it is made pursuant to and in accordance with the terms of the contract between the Publishers Association and the American Federation of Labor.

Mr. Fink: Your Honor, I now offer to prove through this witness that there is a completed sale of newspapers daily to him, and I offer to prove that upon that completed sale the news vendor is a free agent, that he is able to, upon his own initiative, sell the newspapers he purchased, give [125]

(Testimony of William Parrish.)

them away, destroy them, or otherwise do as he wants with them.

The Court: Well, the Court would adhere to the ruling. The ruling is based upon the contract between the parties. It measures their rights and liabilities, and parole evidence is not admissible except for the purpose of explaining some ambiguous or similar condition in the contract.

Mr. Fink: We are not entitled to show that there was an executed oral contract varying the terms of the master contract?

The Court: Well, I would not consider what you are asking for is an executed oral contract. If the contract provides that the papers shall be returned to the publisher and the witness did not return the papers, the only significance attached to that is, that he did not perform that term of the contract. Maybe the publisher was satisfied not to have him comply in that respect, but that did not change the contract.

Mr. Fink: I will get at it another way to complete the record on that subject. I am sorry.

Q. Mr. Parrish, as I understand you, the last exhibit introduced was abandoned some time in 1938 or 1939. Was that your testimony?

A. To the best of my recollection.

Mr. Jacobs: Do I understand the agreement was abandoned in 1937 and 1939?

The Court: You mean it expired, I suppose?

(Testimony of William Parrish.)

Mr. Fink: No, I do not, your Honor. I mean the use of the form last introduced in evidence, the use of the form was abandoned in 1938 or 1939.

Q. And that is correct, according to your best recollection? A. That is correct.

Q. How did you proceed after the abandonment of that form in the individual contract?

A. By oral contracts, just that it was understood that it was the contract which the vendor had between the individual publishers.

Q. And this individual agreement was made between the wholesaler and the individual vendor. Is that correct? A. No.

Q. How were they made?

A. Between the publisher and the individual vendor.

Q. Now, did you continue to return papers in the same manner as you did before, under the oral contract?

Mr. Jacobs: If your Honor please, I think the witness—Mr. Fink is trying to get an indirect answer that he could not get directly. This contract and the terms of it are part of the plaintiffs' complaint. This is the basis of their claim for refund, the basis of this suit. Do I understand now that he is trying to repudiate that contract and say there was some other agreement between the parties?

The Court: Well, are you objecting to the last question?

Mr. Jacobs: I certainly do.

The Court: I will sustain the objection. [127]

(Testimony of William Parrish.)

The Witness: Your Honor, may I ask to confer with the friend of the Court a minute? As I sit here and listened to the question and the objection, that section is being entirely misconstrued.

The Court: I appreciate that you have taken an active interest in this matter as an officer of this organization, the matter of the contract, but the lawyers attend to this matter. It is your duty as a witness to just answer the questions. I don't see any point in what you ask. Unless the attorney would like to confer with the witness.

Mr. Ladar: I think during the recess we will have that opportunity.

Q. (By Mr. Fink): Mr. Parrish, are you free to stop selling newspapers at any time?

Mr. Jacobs: An objection, your Honor. Again the contract specifically states they are engaged to sell newspapers and sell them at the times provided.

The Court: I will sustain the objection.

Mr. Fink: Where do you find that?

Mr. Jacobs: Principally on the ground that the contract is alleged to be the agreement between the parties and that measures the rights of the parties.

Mr. Fink: Do I understand the objection was sustained?

The Court: Yes.

Q. (By Mr. Fink): Mr. Parrish, in the selection of corners or [128] outlets, are the vendors free to refuse to accept a contract at a given corner?

A. As far as the publishers are concerned, yes.

(Testimony of William Parrish.)

Q. Are the vendors free to refuse to accept a contract at a given corner or outlet?

A. They are free from any requirements of the publisher.

The Court: You mean by that you don't have to sell papers on a corner if you don't want to sell them?

A. What I mean——

The Court: Well, answer that question. If you don't want to go and sell *The Chronicle* or *The Examiner* at a corner, you don't have to do that.

A. That is correct.

The Court: You don't have to work any place unless you want to.

A. You don't have to sell, no.

Q. (By Mr. Fink): Do you employ substitutes from time to time?

Mr. Jacobs: An objection, your Honor. There again it is immaterial whether they employ substitutes. The question is not whether they have employees, but whether these individuals are employees.

The Court: I think that is going too far afield. I will sustain the objection.

Mr. Fink: May I be heard again?

The Court: Yes. [129]

Mr. Fink: I am trying to establish by competent evidence that these men are free agents. One element of control is that fact, that they are free agents.

(Testimony of William Parrish.)

Th Court: That is a matter for argument. I understand your position in this matter.

Mr. Fink: Your Honor, how am I going to base an argument unless I have something in the record to show?

The Court: Well, you have set up the fact that these parties are acting under a contract and that contract measures the rights of the parties. Now, if that contract is what you say it is, it is a contract whereby the news vendors are independent contractors. Then they are independent contractors, but whether or not they performed the contract or did something in actual practice that is different than under the terms of the contract, merely indicates how they are performing under the contract, but it does not change the rights of the parties.

Mr. Fink: And how they, themselves, are construing the contract, and I say, under the terms of the contract a necessary element to show is that these men did employ substitutes, they did pay the substitutes themselves. We don't even know who they are. And that is part of my case and part of my showing. We exercise no control over the situation at all. It is a necessary element.

The Court: Well, the contract itself provides the manner in which these news vendors are selected, does it not? [130]

Mr. Fink: How they are what?

The Court: I read the contract. Correct me if I am incorrect. I recall a provision in the contract which says the Union shall furnish a list of

(Testimony of William Parrish.)

names, and the newspapers are free to select any of the persons listed in that list, free to select them. If they don't like them, then they can ask the Union to submit other names. Am I correct about that?

Mr. Fink: In substance you are correct, yes, sir.

The Court: Now, that provision measures the rights of the parties.

Mr. Fink: I respectfully disagree with the Court. It does not do anything of the sort.

The Court: All that it means is, if this witness, for example, sends a substitute and the newspaper makes no objection to him, they accept him under the terms of the contract.

Mr. Fink: It is done by them without our knowledge. They employ him; they may do so. We don't know their names; their names never are submitted to us and they do it as a free agent.

The Court: Then, maybe they may not be performing their part of the contract, and you may be accepting that manner of performing the contract. Still, under the terms of the contract there are things to be done. I think, Mr. Fink, you have made your position clear and the discussion we have had is in the record and shows the basis of the ruling. You are [131] protected so far as the record is concerned on what you are endeavoring to show.

Mr. Fink: I desire, if your Honor please, to make an offer of proof.

The Court: All right.

(Testimony of William Parrish.)

Mr. Fink: Your Honor, I offer to prove by the witness, William Parrish, that the news vendors in San Francisco on the corners employ substitutes; that they employ substitutes of their own choosing; that the publishers have nothing to do with the substitutes who are employed; that the news vendors themselves have substitutes where substitutes are employed, that we do not know the names of these substitutes; that this course has been pursued from the inception of the 1937 contract down to date and still exists.

May I add to that one addition? The statement of the offer, may it continue, with the permission of the Court: And that insofar as the guarantee is concerned, if the guarantee provision of that contract becomes applicable, the publishers do not know the means and methods of allocating the guarantee.

Q. Mr. Parrish, can you news vendors sell other articles than newspapers?

Mr. Jacobs: I object to that as expressly covered by the contract.

The Court: Well, you are asking whether they can do something. [132] That calls for his conclusion and an interpretation of the contract. You can ask what he does.

Mr. Fink: I think you are right. The question was badly worded.

Q. Do the news vendors in San Francisco sell articles other than newspapers?

(Testimony of William Parrish.)

Mr. Jacobs: Objected to as immaterial whether they did or not, because the rights of the parties to sell other newspapers is covered by the contract.

The Court: It provides they can, does it not?

Mr. Jacobs: They can only if the publishers permit. Paragraph 1 covers that. I point out that the specific contract between the individual vendor and the publisher determines whether he sells that paper. Paragraph 10 provides:

“The Publisher (or Publishers, if such corner be a consolidated corner) shall designate each corner whether full time, part time, special wrapped edition corner, or a special event corner where the newspapers produced by it or them shall be sold, and each of said publishers shall in its or their discretion contract for the sale of said newspapers (other than special wrapped editions) upon a basis of exclusive representation or joint representation, as the Publisher (or Publishers, as the case may be) shall determine.”

The Witness: I believe Section 25 is where the matter [133] is really covered.

The Court: There is no such section.

The Witness: One of the last sections before the set-up for the signing committee, and so forth.

Mr. Fink: Section 20, if Your Honor please, is the section in the 1937 contract. I think it be-

(Testimony of William Parrish.)

comes something else in a later contract. Section 20 reads:

“News Vendors coming under the terms of this agreement and selling any newspaper or newspapers produced by the Publishers or any of them and at the same time offering for sale other newspapers, magazine, or publications, shall not be guaranteed any profit under the provisions hereof.”

The question pending is, Do the vendors sell other articles than newspapers?

Mr. Jacobs: What contract?

Mr. Fink: 1937.

Mr. Jacobs: You refer to which paragraph of the 1937?

Mr. Fink: Turn to Section 20.

The Court: Now, what is the question, Mr. Fink?

Mr. Fink: Do news vendors sell other articles than newspapers?

The Court: You mean do all of them?

Mr. Fink: No.

Mr. Jacobs: There is an objection, Your Honor.

The Court: Well, I don't see any objection to that. It is harmless.

The Witness: A. I, myself, personally sell nothing but newspapers.

Q. (By Mr. Fink): Mr. Parrish, from your experience as business agent and the present secretary and treasurer of the Union, do you know

(Testimony of William Parrish.)

of your own knowledge whether other news vendors sell articles other than newspapers?

Mr. Jacobs: The same objection, Your Honor. Whether they can or cannot sell.

The Court: He did not ask that. He asked whether they did.

Mr. Jacobs: I withdraw the objection.

A. Yes, Your Honor, on a great many——

The Court: Just answer the question, please.

A. Yes.

Q. (By Mr. Fink): Do you know of your own knowledge that other news vendors sell magazines?

A. Yes.

Q. Do you know of your own knowledge that others news vendors sell these 25 cent pocket books?

Mr. Jacobs: An objection, Your Honor, to the whole line of inquiry. It is trying to get indirectly into the record that these people do sell other things.

The Court: Well, if they do, there is no harm in that. Still, it would not make any difference in the interpretation [135] of the contract.

Mr. Jacobs: I will point out that Mr. Fink is trying to find out here that the vendors had an independent choice. That is covered by the contract.

The Court: The contract provided that he did not get a guarantee if he did.

Mr. Jacobs: It also provides that they may not sell other things.

Mr. Fink: That is not true. Section 10 is not the section. Section 20, they must be read together.

(Testimony of William Parrish.)

Mr. Jacobs: Section 20 provides that if they are granted permission to sell other things then they are not entitled to the rights of the guarantees.

Mr. Fink: Where is there anything about permission in Section 20? Just point out where there is anything about permission.

Mr. Jacobs: I will address myself to the Court.

The Court: There is no use getting worked up.

Mr. Fink: When these statements are made by the Government's representative, I feel I have a right to point out, through you. Where is there anything out about permission?

The Court: All right, you gentlemen don't have to quarrel over this. There is a question of law involved. You don't have to get so excited.

Mr. Fink: I cannot let misstatement go in.

Mr. Jacobs: I am not going to quarrel as to whether there is a misstatement. I want to read from Section 10, if I may, with the permission of the Court.

The Court: All right.

Mr. Jacobs (Reading): "The Publisher (or Publishers, if such corner be a consolidated corner) shall designate each corner whether full time, part time, special wrapped edition corner, or a special event corner where the newspapers produced by it or them shall be sold, and each of said Publishers shall in its or their discretion contract for the sale of said newspapers (other than special wrapped editions) upon a basis of exclusive representation or joint representation, as the Publisher (or Publishers as the case may be) shall determine."

(Testimony of William Parrish.)

The Court: Of course, I think that provision, does it not, refers to the right of the publisher to determine whether the news vendor shall sell exclusively the paper of the publisher or may be permitted to sell newspapers of any other publisher at the corner.

Mr. Jacobs: I do not understand what you mean.

The Court: The language seems to me clearly to indicate there that the publisher reserves the right to designate whether or not the news vendor shall sell on a particular corner only the newspapers, on that corner, or whether he may [137] on that corner sell as well newspapers of other publishers.

Mr. Jacobs: Exactly, Your Honor.

The Court: This witness is not being interrogated on that subject of whether they can sell other articles besides newspapers, but whether, in fact, he does.

Mr. Jacobs: I still think in the letter and spirit of that contract, he is engaged to sell newspapers of these publishers.

Mr. Fink: That is your interpretation.

The Court: Well, so far as I see the question of law involved, it does not make any difference whether he does sell other articles. That is not affecting the status under the control. That matter is not covered under the contract and he may be free to do that. If he engages, however, in other activities, then he shall not be entitled, under that section, to the benefit of the guarantee.

(Testimony of William Parrish.)

Mr. Fink: The question pending, if it please the Court, is as to whether the witness on the stand, of his own knowledge, knows that other vendors sell these 25 cents pocket books. A. Yes.

Mr. Jacobs: May it please the Court, if there is going to be interrogation on this line, let the witness say who they were, how many.

The Court: It may be vague and the Court will attach to it just such weight as it is entitled to have.

Mr. Fink: I assure this Court that this testimony will be [138] tied tighter than even Counsel wants.

The Court: I don't know why we can't get some stipulation of facts with regard to matters of this kind, subject to its materiality and subject to pertinency to the matter of interpreting the nature of the contract and the relationship. If men do, in fact, sell articles, why do we have to waste a lot of time establishing that fact, leaving the matter of its pertinency and relevancy to later consideration by the Court? It seems to me we are wasting an awful lot of time on matters of fact. Probably, as facts, they are not subject to contraversion.

Mr. Jacobs: I quite agree with you.

Mr. Fink: All right. I offer to stipulate with you. I present to you a series of photographs showing what the vendors sell, which later I will identify. I ask, if Your Honor please, that the photographs, a set of which I just handed Counsel,

(Testimony of William Parrish.)

be marked for identification and be given the next number, A, B, C.

Mr. Jacobs: I have had the pleasure of seeing the photographs.

Mr. Fink: Not all of them.

Mr. Jacobs: They are excellent photographs.

The Court: I think we might shorten this as if it were a pre-trial right now. Are you going to present evidence showing—after all the Court walks around the streets of [139] San Francisco. I suppose I see some of these things, know about them—if there is no controversy about them as matters of fact, there is no use wasting time.

Mr. Jacobs: May I make a suggestion? The publishers should, I am sure they know because some of their records indicate they know what corners magazines are sold upon. The very fact of the contract waiving the provision about magazines, if the contract of the publisher says there are newspapers sold on so many corners and on so many other corners magazines are sold, we are not prepared to dispute that fact.

The Court: Make a stipulation to that. Can you state in general terms how many corners?

Mr. Fink: No, I cannot state offhand. I can produce those figures easily enough, but I point out to you that in response to the Court's suggestion, Counsel now has said if we will produce a competent witness. We have a competent witness right on the stand; here he is. He is one of them. Counsel has accepted the Court's suggestion.

(Testimony of William Parrish.)

The Court: All right. Never mind the witness now, Mr. Fink. You have prepared the case, you are familiar with it. Can you make a statement to the Court of approximately how many corners, make a statement of the facts that the witness is going to testify to?

Mr. Fink: Well, if Your Honor please, I most respectfully ask leave to present the case as I feel it should be presented, [140] in view of the fact that the tender of stipulation is turned down.

The Court: No, I understood Mr. Jacobs to say if that statement will be made——

Mr. Fink: He said a competent witness, Your Honor. That is what he said.

Mr. Jacobs: It does not have to be under oath. If a witness stands up and says, "We sell newspapers on so many corners, and on so many corners magazines are also sold," we won't dispute that. We will accept the statement. We will accept a statement, if you wish, taken from the books and records of the corporation.

The Court: I think that is fair.

Mr. Fink: It is not satisfactory to me. He says if it is taken from the books and records of the corporation. I have the actual evidence by photographs here, and I am prepared to tie it up.

The Court: I am not going to spend the time of the Court in having 50 photographs, one by one, offered in evidence here. Counsel has offered to stipulate with you. Will you accept Counsel's statement as well as the statement of the publishers

(Testimony of William Parrish.)

as to the extent to which this manner of conducting business is carried on? Will you accept Mr. Fink's statement if he says his witness will so testify?

Mr. Jacobs: If Mr. Fink gives me his assurance that the [141] figure is not pulled out of the air, but is a figure in fact taken from the books of the corporation—I don't want a vague estimate of how many corners there are.

The Court: Can you furnish that statement?

Mr. Fink: Yes, I can furnish it.

The Court: It is going to save a lot of time. All that is necessary is for you to get up and say that you have conferred with your client; they tell you their records show there are so many corners in San Francisco where newspapers are sold and so many corners where news vendors are selling other articles besides.

Mr. Fink: Now, Your Honor, the publishers' records do not show any such thing. That is the fallacy and the difficulty of Counsel's offer to stipulate. I was trying to make that point.

The Court: How are you going to prove it?

Mr. Fink: By actual witnesses.

The Court: You mean this witness went around and counted the places?

Mr. Fink: He did not. He is a general witness. I am going to show by actual witnesses exactly the extent of this thing. Let me make this point, Your Honor: We don't know how many sell the scratch sheet. We have no record on that. That is a

(Testimony of William Parrish.)

racing paper. We don't know how many sell the National Turf, all those things. But we do know they are sold. [142] We have no record of it. How can I produce books and records when there are not such? We don't know how many vendors sell these pocket books. We do know that one has a big supply of them on a rack. I am going to connect the evidence, the Court need not worry about that. I am prepared to do it. But we have no books or records on this. My next question is going to be whether he knows the scratch sheet is sold by vendors, the National Turf. I have forgotten the rest of the names. It doesn't make any difference, the Daily Racing Form is another. We have no books and records on that.

Mr. Jacobs: If it please the Court, I have here in my hand a form supplied to me by the representative of the Call-Bulletin which purports to be a wholesale weekly sales report. In the last column there it contains these words, "Write magazines in column if vendor sells magazines". Now, maybe that form is not used, but it would indicate that there is a provision in the books of the Call-Bulletin, at least, where such records could be kept.

Mr. Fink: I am familiar with that form and it is designed to show whether he sells, not what he sells.

The Court: Maybe that would be the answer to it.

(Testimony of William Parrish.)

Mr. Fink: May we get back to the question? I have forgotten which one of the series I had asked the witness.

(The photographs were marked Plaintiff's Exhibit 48 for identification, A, B, C, D, E, F, G and H.) [143]

The Court: Do you want me to take judicial knowledge of the fact that news vendors sell other articles at various street corners in San Francisco besides the newspapers, and that they have been doing that for a number of years?

Mr. Fink: Yes, Your Honor.

The Court: All right. I will take judicial notice of it. You don't need to produce evidence on it.

Mr. Fink: If the Court will permit me to say, I do want the Court to take judicial notice of it, and I do want the Court to take judicial notice of the extent of it.

The Court: Well, if you can make some statement as to the extent of it.

Mr. Fink: I will make a statement. Now, if the Court please, is there going to be an objection to the introduction of these photographs?

Mr. Jacobs: There certainly is.

Mr. Fink: Well, now, they are marked for identification. Then we will get at them another way.

Q. Are there newspaper publishers in San Francisco other than the four daily papers?

(Testimony of William Parrish.)

Mr. Jacobs: Excuse me. Not to take the time of the Court, I do not doubt that they are genuine photographs. I am going to object for an entirely different reason.

Mr. Fink: You are not going to require the production of the photographer? [144]

Mr. Jacobs: No.

Mr. Fink: Let's make the tender and get it over with. I now offer in evidence, if Your Honor please, and ask that they be marked in evidence, the series of photographs which now bear Exhibit No. 48 A through H, for identification.

Mr. Jacobs: The objection, Your Honor, is on the ground that these are not representative photographs of the news vendors supplied by the plaintiff publishers, and the only validity they can have is to indicate a representative condition. To produce a photograph like this, where it may be one out of 500 vendors having a stand like this, to put it before this Court in this record as a typical vendor is to distort the facts.

Mr. Fink: Each one happens to be, if Your Honor please, a separate corner.

The Court: Well, I think if Counsel doesn't mind, I want to ask a few questions of Mr. Parrish.

Q. About how many news vendors are there functioning under this arrangement with the newspapers of San Francisco?

A. That would be a difficult question.

Q. Well, approximately?

A. The number may go as high as 150, Your Honor.

(Testimony of William Parrish.)

Q. You mean it varies from time to time?

A. Yes, sir. I don't mean 150 people selling magazines.

Q. I am not asking you about that. I want to know how many [145] news vendors there are, on the average, selling newspapers in San Francisco who belong to the Union.

A. I would say today it would be in excess of 100.

Q. In excess of a hundred? A. Yes.

Q. Have you been around San Francisco and looked at these places where they sell, as demonstrated in the photographs, other than newspapers?

A. Magazine stands, racing forms.

Q. You say you have been around and seen them?

A. Certainly.

Q. With respect to the total number of persons who belong to the union who sell newspapers, how many maintain that type of stand, as presented in the photographs?

A. Which particular type, your Honor?

Q. Well, these stands. Look at the photographs.

A. You mean large magazine stands, your Honor?

Q. The kind represented in the photograph.

A. This, for instance, I would say approximately ten.

Q. You would say about one-tenth of the news vendors operating under this contract have stands where they sell other things besides the newspapers?

A. No, that is done as a rule, your Honor.

(Testimony of William Parrish.)

Q. That is what I am asking.

A. I say there are about ten news stands, your Honor, and then there are a great number of men who sell, say, the Racing Form.

Q. How many in proportion to the total number?

A. That would run around 15, and in 1937 the number was larger. [146] In 1937 you could get these forms, but you cannot get them now. It is difficult to get them. The number then would run around 50 or 60. Then there are a number of men who are selling the People's World.

Q. I am not talking of other newspapers.

A. Well, that is not a party to this contract. That is something. Only people who can handle that under the law of the union is those who make in excess of the guarantee.

Q. How many, in your opinion, are selling that?

A. The People's World?

Q. The People's World?

A. I would say, oh, 50.

Q. 15 or 50?

A. 50. Some of these people sell all of them. Some only sell one of them.

Q. That brings you down to a point where no news vendors in San Francisco are selling only newspapers.

A. Oh, no, your Honor.

Q. What is the proportion, approximately?

A. I would say in the year 1937-1938 there were 100, without a shadow of doubt, and more, who were selling other publications—we use the word "publications"—than that which they had a contract to sell.

(Testimony of William Parrish.)

Q. And how many were selling just newspapers?

A. Your Honor, if you use the word——

Q. I don't want you to argue with me about it.

A. I don't want to argue, your Honor. [147]

Q. How many were selling, to the best of your knowledge, nothing but newspapers?

A. If 100 were selling magazines, 650 must have been selling newspapers.

Q. Would it be fair to state that about one-sixth of the total number of news vendors were selling other things besides newspapers?

A. Under Section 20, yes.

Mr. Fink: I have an offer in evidence of these photographs, your Honor.

The Court: I did not want to interfere, Mr. Fink, but it seems to me this matter cannot be very controversial.

Mr. Fink: If your Honor please, I cannot see where there can be a controversy on it to save my neck, but apparently Counsel for the defendant does.

The Court: Now, if the witness' statement is not accurate, Counsel can cross-examine or put on other testimony.

Mr. Fink: Certainly. I understand these are admitted in evidence?

The Court: Is there an objection?

Mr. Jacobs: There is an objection, your Honor.

The Court: The objection is that they are not typical. Is that your point?

Mr. Jacobs: Yes.

(Testimony of William Parrish.)

The Court: I think that goes to the weight of the testimony. I will allow them to be admitted.

(The photographs heretofore marked Exhibit 48 A to H [148] for identification, were received in evidence and marked Plaintiff's Exhibit 48, A, B, C, D, E, F, G and H.)

Q. (By Mr. Fink): Now, just to clean that matter up entirely, Mr. Parrish, are there vendors, to your knowledge, in San Francisco that sell articles other than publications, no matter what the publications are?

Mr. Jacobs: May the record show the same objection, your Honor.

The Court: Will you read that, please?

(Question read by the Reporter.)

The Court: Hasn't he already answered that?

Mr. Fink: No, your Honor. We have been dividing them, and my questions and the Court's questions were all devoted to publications. This question is whether he knows of his own knowledge whether the vendors sell something else, articles other than publications.

The Court: Oh, all right. You mean candy bars, something like that?

Mr. Fink: Yes, your Honor, candy bars, razor blades, various things that will be shown here.

The Court: Very well. I will overrule the objection.

(Testimony of William Parrish.)

The Witness: A. Your Honor, I cannot answer that today, but a few years back, at the City Hall, perhaps your Honor remembers——

The Court: Just answer Yes or No, and we will get along. [149] A. Yes, say 38 to 37.

Q. (By Mr. Fink): Mr. Parrish, does your membership have a proportion of disabled members?

A. Yes.

Q. When I say “disabled” members, are they handicapped in various ways? A. Yes.

Q. But each one——

A. By loss of limbs, loss of eyesight, loss of hearing and other ailments too numerous to mention.

Q. Are there some of them, do you have members who are mentally deficient? A. Yes.

Q. Now, did you ever take occasion to reduce that to a matter of proportion? Do you know what is the approximate percentage?

A. I presented to the Bureau of Internal Revenue a proportionate recap on it.

Q. Do you remember any of those figures?

A. No, but I have it in my briefcase, and I am certain that Counsel for the Government has the figures.

Q. And after the recess you can have that figure, can you? A. Yes.

Q. Now, these handicapped members, no matter what handicap they may have, receive the same type of contract under the Master Contract that the other vendors receive? A. Yes.

(Testimony of William Parrish.)

The Court: I think this might be an appropriate time to take the recess now.

(Recess.) [150]

Q. (By Mr. Fink): Mr. Parrish, do you submit any written reports to the publishers as a vendor? A. No.

Q. Do you report to the premises of the publisher? A. I don't.

Q. Are you required to attend any sales meetings, conferences, consultations? A. No.

Q. Are any instructions given to you by the publishers?

Mr. Jacobs: I object to what constitutes instructions as a conclusion. Whether given by the publisher, that is a very vague term. The more important objection is what constitutes instructions. That calls for a conclusion on the part of this witness.

The Court: It does call for the conclusion of the witness, I think. If the instructions were in writing, that would be the best evidence, that would be the orthodox type of objection, I suppose.

Mr. Fink: I withdraw it.

Q. Are any written instructions given you by any publisher? A. No.

Q. Are any verbal instructions given you by any publisher? A. No.

Q. Are any of your expenses borne by the publishers, whatever your expenses may be?

A. No, with the exception of one thing.

(Testimony of William Parrish.)

Q. What is that?

A. Under the agreement, in case of [151] arbitration, they are liable for 50 per cent.

Q. Ordinarily nothing of that kind?

A. No.

Q. Are you allowed a drawing account or given any advance, let's add then, by the publisher?

A. I am afraid not.

Q. Are you furnished with transportation?

A. No.

Mr. Jacobs: You understand, Mr. Parrish, this is directed to you individually, not the Union. Is that your understanding?

Mr. Fink: Now, if your Honor please, Counsel will have an opportunity to cross-examine fully.

Mr. Jacobs: I object, unless you state what the question means. Is this man furnished any transportation, is one thing; and whether the Union is, is another.

The Court: He did not ask that, Mr. Jacobs. All he asked was whether he was furnished with transportation.

Q. (By Mr. Fink): Mr. Parrish, the matter of these advertising placards that you see at various corners, are they supplied by the publisher?

A. Yes.

Q. Are you required to put them out?

A. No. I never, my own self, put a rack card up since the first agreement.

(Testimony of William Parrish.)

Mr. Jacobs: I am sorry, I did not hear.

The Court: Read it.

(Answer read by the Reporter.)

Mr. Fink: I think you may cross-examine. [152]

Cross-Examination

By Mr. Jacobs:

Q. Mr. Parrish, have you got a copy of the original constitution and by-laws with you?

A. Yes. Pardon me, your Honor.

The Court: It is all right.

A. Your Honor, we will be able to get this stuff back, will we not?

The Court: Have you any copies?

A. I was just asked for that. One of the members had it, more or less as a keepsake.

Q. Can you substitute a copy of the document he is asking for?

A. That is the only copy I know of. I mean, after the trial is over.

The Court: Oh, yes.

Mr. Jacobs: I would put in a copy now if I had one, your Honor.

The Witness: That is 1937, that is the first one.

Mr. Jacobs: I ask that that be marked for identification, please.

The Witness: Do you want these other three now?

Mr. Jacobs: Let me see them. These are the same?

(Testimony of William Parrish.)

A. No, this is a revision of that one; this one is a revision, and then this one is the last one, and there is the amendments.

(The Constitution was marked Defendant's Exhibit B for identification.) [153]

Mr. Jacobs: May I have it, please.

Q. I show you Defendant's Exhibit B for identification and ask you if you recognize it.

A. It is the constitution that was adopted in 1937 by the Union.

Q. Is this the original constitution?

A. Yes, it is the original.

Q. Does it contain the by-laws, too?

A. It contains the constitution and by-laws.

Mr. Jacobs: The Government offers Defendant's Exhibit B in evidence.

Mr. Fink: No objection.

The Court: Very well, it will be admitted.

(The Document referred to and heretofore marked for identification was received in evidence as Defendant's Exhibit B.)

Q. (By Mr. Jacobs): Mr. Parrish, I note from Defendant's Exhibit B, the original constitution and by-laws, that you are affiliated with the American Federation of Labor. When were you so affiliated?

A. I cannot give you the exact date of the receipt of the charter, but on or about June 1st Mr. Shelley, the President of the Central Labor Council, said he would recommend that we be issued a

(Testimony of William Parrish.)

charter, and it was a certainty that we would be given it.

Q. You were issued a charter by the American Federation of [154] Labor? A. Yes.

Q. Mr. Parrish, is it a fair statement to say that the American Federation of Labor is an organization composed of labor unions?

Mr. Fink: Just a minute, if your Honor please. I object to that as immaterial, incompetent and irrelevant. What has it got to do here?

Mr. Jacobs: May it please the Court, it is Mr. Fink's contention——

The Court: I will overrule the objection.

The Witness: Will you restate the question, please.

Q. (By Mr. Jacobs): Is it a fair statement, Mr. Parrish, to say that the American Federation of Labor is an organization composed of labor unions? A. To the best of my knowledge.

Mr. Jacobs: Mark that for identification, please.

(The document was marked Defendant's Exhibit C for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit C for identification, and ask you if you recognize it?

A. Yes, it is the constitution and by-laws which was adopted by the Union, I believe, in 1938.

Q. Does the notation at the end there refresh your recollection, September 17, 1939?

A. Is that when it was? Was it that late? [155]

(Testimony of William Parrish.)

Q. Yes. A. Well, that is correct, then.

Mr. Jacobs: I offer this in evidence as Defendant's Exhibit C.

The Court: It may be admitted.

(The document referred to and heretofore marked for identification was received in evidence as Defendant's Exhibit C.)

Mr. Jacobs: Will you mark this for identification?

(The document referred to was marked Defendant's Exhibit D for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit D for identification, and ask you if you recognize it.

A. It is a copy of the constitution and by-laws of the International Printing Pressmen and Assistants Union of North America.

Mr. Jacobs: The Government offers Defendant's Exhibit D for identification in evidence.

Mr. Fink: I object to the introduction in evidence of that document as being incompetent, immaterial and irrelevant, with nothing to show that it throws any light on the problem we are here to solve.

The Court: What is the document?

Mr. Jacobs: May I ask a preliminary question, if it please the Court?

The Court: All right. [156]

Q. (By Mr. Jacobs): What connection, if any, has the News Vendors Union, of which you are

(Testimony of William Parrish.)

the secretary and treasurer, with the International Printing Pressmen and Assistants Union of North America? A. We are affiliated.

Q. What do you mean by "affiliated"?

A. We support the Union of the International.

Q. When were you affiliated?

A. 1939, or the first month in 1940, right around that time.

Mr. Jacobs: The Government renews the offer.

Mr. Fink: I renew the objection.

The Court: That is a big book, there.

Mr. Jacobs: I will tell you why I am introducing it, your Honor, for two reasons: In the first place, the constitution and by-laws of this Union adopt and incorporate by reference the constitution and by-laws of the parent Union.

Q. Is that correct?

Mr. Fink: Well, the document speaks for itself.

The Court: If you say that is in there, I think it would admissible.

(The document referred to and heretofore marked for identification was received in evidence and marked Defendant's Exhibit D.)

Mr. Jacobs: May I see Defendant's Exhibit C, please? Will the Court excuse me just one moment? May this be marked for [157] identification.

(The document referred to was marked Defendant's Exhibit E for identification.)

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit E for identification, Mr. Parrish, and ask you if you recognize it?

A. It is a copy of the constitution and by-laws and general laws of Local No. 468.

Q. Is this constitution and by-laws in force today? A. They are.

Mr. Fink: That is admitted.

Mr. Jacobs: The defendant offers in evidence Defendant's Exhibit E for identification.

The Court: Is that the same as you offered before?

Mr. Jacobs: No, this one is brought up to date, in present existence.

The Court: Very well, admitted.

(The document referred to and heretofore marked Defendant's Exhibit E for identification was received in evidence.)

Q. (By Mr. Jacobs): Mr. Parrish, turning your attention now to your testimony of yesterday, with particular reference to negotiations between the Union and the Publishers, if I recall correctly you stated you were a member of the negotiating committee of the original contract, were you not?

A. Yes.

Q. Now, will you state what the procedure of the negotiating [158] committee was in preparing and submitting proposals?

A. I don't quite get the gist of your question, Mr. Jacobs.

(Testimony of William Parrish.)

Q. Put it this way—strike that question.

You were appointed by the membership?

A. Elected by the membership.

Q. And authorized to negotiate a contract with the publishers. Is that correct?

A. That is correct.

Q. And you were a member of that committee?

A. That is correct.

Q. Now, how did the committee proceed?

A. We first met on the advice of Mr. Shelley, who was president of the Central Labor Council, with Mr. Sam Kagel, who at that time was the Chief Assistant, I believe, to Mr. Henry B. Melnikow of the Pacific Coast Labor Bureau, and discussed what we wanted in the way of conditions from the publishers.

Q. What?

Mr. Fink: Wait a minute.

Mr. Jacobs: Are you through?

A. No. After all, that was quite some time, Mr. Jacobs. That was immediately following an early morning meeting. At that time we were informed by Mr. Kagel——

Q. You don't understand the question. All I want to know is the procedure, Mr. Parrish. Did the committee——

Mr. Fink: Just a minute.

Mr. Jacobs: I am asking a question. [159]

Mr. Fink: If your Honor please, Counsel asked this witness a question and it was a broad question, and the witness is giving an answer, I submit.

(Testimony of William Parrish.)

The Court: I think that may be true, but I don't think it was intended by the question that the witness was to be asked for conversations, or what they discussed. Can't you narrow your question? It is broad.

Mr. Jacobs: I will, your Honor.

Q. Who drew the first written proposal submitted to the publishers?

Mr. Fink: Objected to as incompetent, irrelevant and immaterial. It is in evidence. What difference does it make who drew it up?

Mr. Jacobs: Nobody paid more attention to negotiations and all the steps.

The Court: I will overrule the objection.

A. The contract was drawn up by a committee of eight men who represented the Union, with the aid of the Pacific Coast Labor Bureau.

Q. (By Mr. Jacobs): After that thing was drawn up was it passed upon by a vote of the committee? A. By a vote of the committee?

Q. Yes, the negotiating committee.

A. Yes, nothing could go in there unless by unanimous consent.

Q. And the first written proposal was passed unanimously by [160] the committee. Is that correct? A. That is correct.

Q. And before submitting it to the publishers it was submitted to the membership of the Union?

A. Yes.

Q. And was passed by the membership of the Union, was it not?

A. Yes, yes, that is correct.

(Testimony of William Parrish.)

Q. Was that same procedure followed with respect to the negotiations of the 1939 contract?

A. That is correct.

Q. And the same procedure with respect to the written proposal submitted to the publishers under that contract?

A. Will you restate that question, please.

The Court: Read it.

(Question read by the Reporter.)

A. Yes.

Q. (By Mr. Jacobs): Now, on August 31st, 1937, approximately how many members did the Union have in good standing?

A. That is a difficult question for me to answer. I was not secretary.

Q. The figure you gave to the Judge on direct examination was about 600.

A. Well, the figure I gave to the Judge was approximately 750.

Q. Is that a fair estimate?

A. Yes, whether they were all in good standing with the Union or not, I have no means of knowing.

Q. At least you had approximately 750 Union members, whether they were in good standing or not.[161]

A. It was between seven and 800.

Q. Today, Mr. Parrish, do you have approximately 200 of the original members still in the Union?

A. I believe that figure is 221, and since that time three or four have passed away.

(Testimony of William Parrish.)

Q. Many of them have died meantime, haven't they? A. Oh, yes.

Q. Mr. Parrish, did you submit to the Bureau of Internal Revenue a statement showing the relative age and the number of men in each age bracket on or about January 16, 1945? A. Yes.

Q. Have you got that? Correct me if I am wrong, Mr. Parrish. Of the membership on or about March 16, 1945, ten of the members were between 18 and 30 years; 33 were between the ages of 30 to 41; 83 between the ages of 41 to 50; 161 between the ages of 51 and 64, and 71 between the ages of 65 and 80.

A. If those are the figures that are here, that is correct.

Q. Will you examine it and see if that is correct.

A. That is correct.

Q. Mr. Parrish, the final contract entered into between the publishers and the Union on August 31, 1937, was submitted to the membership, was it not? A. Yes.

Q. And passed? A. Yes.

Q. Do you know whether all the membership was there at that meeting?

A. It was a big meeting.

Q. You don't know whether they were all there, or not. A. There is no way of knowing.

Q. I understand, Mr. Parrish, that you have approximately ten men suffering from mental disabilities. Is that correct? A. How many?

(Testimony of William Parrish.)

Q. Ten.

A. If it says that there, that is correct.

Q. Is that your recollection?

A. Yes. There might possibly be more.

Q. Were those members present at those meetings when the first contract was passed upon?

A. That would be something I could not answer.

Q. They could have been there and you would not know it.

A. There is no reason why they could not.

Q. And they could have voted and you would not know it.

A. And could have not voted, either.

Mr. Fink: Let's mark that document for identification. If you don't do it, I will ask to do it.

Mr. Jacobs: I am not going to do it.

Mr. Fink: I certainly am, then.

The Court: Very well, let it be marked.

Mr. Fink: I would ask that it be marked for identification.

(The document referred to was marked Plaintiff's Exhibit No. 49 for identification.)

Q. (By Mr. Jacobs): Mr. Parrish, do you know Mr. Charles H. Bowers? A. I do.

Q. Is he a member of the union. A. He is.

Q. The News Vendors Union? A. He is.

Q. A member now? A. A member now.

Q. Has he occupied any office in the Union?

A. He has.

(Testimony of William Parrish.)

Q. Tell what offices and what periods he occupied those offices.

A. He was secretary-treasurer of the Union from the year 1937 until 1943, October, if I recall correctly. He became secretary in the month of October. Make that September. He became secretary in September and ceased to be secretary in October of 1943.

Q. 1943? A. 1943.

Q. You have the minutes of the Union in your possession? A. Yes, I have.

Q. Mr. Parrish, does the record of the Union show, indicate that Mr. Bowers made a trip to Sacramento, California, on or about May 6, 1941?

Mr. Fink: Just a minute. I object to that as not proper cross-examination.

The Court: What are you getting at now?

Mr. Jacobs: I will tell you what I am getting at. I am establishing a foundation for the introduction of a document prepared by the Secretary and Treasurer of this Union, which is inconsistent with the position he takes.

The Court: Well, just ask for the document. Why do you have to go through all that? [164]

Mr. Jacobs: The document was submitted to an agency of the State of California. I will have them identify the document. From this witness I will establish the position and action taken by Mr. Bowers.

Mr. Fink: That simply indicates that my objection is good. That is part of his case. There was no

(Testimony of William Parrish.)

direct examination on that. Let him call Mr. Bowers, or prove the case by his own witness.

Mr. Jacobs: On the contrary, if your Honor please, obviously the position of the plaintiffs, of course, and this witness, is that these people are independent contractors. Mr. Parrish makes no effort to conceal that position; he indicates that is his view as an individual, and also indicates it is his view as an officer of the Union. I want to show by his predecessor in office that a different and opposite position was taken. The only way I can do it is to have this witness testify to the official position of the witness. I would like to do that and then introduce those documents.

The Court: Well, the objection is overruled, if that is the purpose of it.

The Witness: The minutes of May of 1941 show——

Q. (By Mr. Jacobs): May I see the minutes, please.

The Court: Stand back a little, Mr. Jacobs. The closer you get to the witness the more opportunity there is for antagonism. In fact, some of my colleagues won't let attorneys go anywhere near the witness. There is the paper. [165]

The Witness: You will find it at the bottom of the page.

Mr. Jacobs: Will you mark this for identification, please.

(The document referred to was marked Defendant's Exhibit F for identification.)

(Testimony of William Parrish.)

Mr. Jacobs: I show you Defendant's Exhibit F for identification, Mr. Bowers——

A. I beg pardon.

Q. I show you Mr. Parrish, I am sorry, Defendant's Exhibit F for identification, and ask you if these are the official minutes of the News Vendors Union? A. Yes.

Mr. Fink: Of what date?

A. May 11th, I believe it was.

Mr. Jacobs: The meeting called to order on Sunday, May 11th, 1941, at 1:00 p.m. by President McNamee, I read from the minutes:

“Meeting called to order Sunday, May 11th, 1941 at 1:00 p.m. by President McNamee.”

I am reading an excerpt from the minutes, unless there is some objection by Counsel:

“The law and legislative committee referred to Brother Bowers as follows. A hearing was held in Sacramento on the bill to change the status of news vendors from that of small merchants to that of employees, so as to get the benefits of Social Security laws. After hearing Brother Bowers the [166] Legislature Commission decided to request briefs from both sides. The report approved and accepted.”

The Witness: That is not what that reads. It does not say “Legislation Commission.”

Mr. Jacobs: The word I read is stated here to be “Com.” I will amend that statement, not stating “Committee” or “Commission” to read “Legisla-

(Testimony of William Parrish.)

ture Com." A. That is all right.

Q. Mr. Parrish, was the News Vendors Union during the years 1937 to 1940 affiliated with any other organization other than the American Federation of Labor and the International Printing & Pressmen's Union and the San Francisco Labor Council?

A. Well, we were affiliated with the Labor Non-Partisan League; we had affiliations with the Allied Printing Trades Council; we had affiliations with the Union Labor Section of the San Francisco Labor Council; we were affiliated with, I guess that is about all the affiliations that I can recall.

Q. Now, Mr. Parrish, you stated on direct examination that members of the News Vendors Union from time to time sold publications other than newspapers. Is that correct?

A. That is correct.

Q. Has the News Vendors Union entered into collective bargaining agreements with any of the publishers producing such other publications?

A. Yes, we entered into a bargaining agreement.

Q. May I see it?

Mr. Fink: Just a minute. You asked a question.

Mr. Jacobs: I want to see the best evidence. I am conducting my examination, with the permission of the Court.

Mr. Fink: I submit that Counsel is not entitled to break into the witness' answer.

The Court: He answered, Mr. Fink. He said yes, they did. Counsel asked for the document.

(Testimony of William Parrish.)

Mr. Fink: He wanted to make an explanation.

Mr. Jacobs: He can make an explanation on redirect.

The Court: I suppose the best explanation would be to produce it. Go ahead, Counsel.

Q. (By Mr. Jacobs): Have you a copy of that agreement?

A. I have a copy of the agreement with the World Publishing, I think that is the name of the thing.

Q. May I see it, please?

A. As soon as I can find it.

The Court: Are there any other documents you are going to request the witness to produce?

Mr. Jacobs: Yes, I am.

The Court: Why don't you give him a list of them?

Mr. Jacobs: Those have been subpoenaed, your Honor.

The Court: Suppose we take the noon recess, and see if you can get this document and the other documents in order, so he can produce them.

The Witness: That is fine with me, your Honor. I had [168] them all in order.

The Court: Suppose you take them out of your files, and have them handy.

The Witness: Certainly.

The Court: We will recess the trial until 2:00 p.m.

(An adjournment taken until 2:00 o'clock p.m. this date.)

WILLIAM PARRISH

called as a witness on behalf of the Plaintiffs, resumed the witness stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Jacobs:

Q. You will recall, Mr. Parrish, before the recess you were searching for a contract between the union and the World Publishing Company.

(Witness handed a document to counsel.)

Mr. Jacobs: May this be marked for identification, please.

The Clerk: Marked Defendant's G for identification.

(Thereupon the document referred to was marked Defendant's Exhibit G for identification.)

Mr. Jacobs: I hand you Defendant's Exhibit G for Identification, and ask you if you recognize it?

A. This is the contract that was signed by the union.

Q. And the publishers, the World Publishing Company, is that correct? A. Yes.

Q. What publications are produced by the World Publishing Company?

A. The Communist paper.

Q. What is the name of it?

A. The People's World.

(Testimony of William Parrish.)

Q. Is the People's World sold by members of your union?

Mr. Fink: Just a moment. May it please the Court, that [170] is objected to as incompetent, irrelevant and immaterial, and shedding no light on the issues of this case, because what is the contract or what the intention may or may not be with some third party cannot have anything to do with this case.

Mr. Jacobs: Are you through, Mr. Fink?

Mr. Fink: Yes.

Mr. Jacobs: There are at least two reasons why this contract and the question are relevant.

In the first place, Mr. Fink injected into the issue the fact that these news vendors sold other publications, and I am entitled to show the circumstances under which they sold those other publications if that issue is material and the plaintiffs are allowed to introduce that in evidence.

And secondly, and equally important, is the fact that plaintiffs contend here is a group of independent contractors. By the terms of this contract, which I will show to the Court and read from to the Court, it indicates that these vendors are employees.

The Court: Of the publishers?

Mr. Jacobs: Yes, your Honor.

Mr. Fink: Not of these plaintiffs, if your Honor please of some third party.

The Court: That is what prompted my question. Do you mean this contract indicates that the mem-

(Testimony of William Parrish.)

bers of the union [171] are employees of the World Publishing Company, or that they are employees of the publishers involved in this case?

Mr. Jacobs: Employees of the World Publishing Company, selling that publication at the same time and at the same place and under the circumstances the same as the newspapers here involved.

Mr. Fink: So what?

The Court: I think the mere fact that the news vendors were employees of somebody else, or some other publisher, would not prove what the nature of their relationship was with the plaintiffs in this case.

Mr. Jacobs: Well, I don't want to quarrel with your Honor's ruling; I can't quarrel with your Honor's ruling.

The Court: You may mark it for identification. I think the objection is good. There is no issue before me as to what the relationship of the news vendors was to this other publication.

Mr. Jacobs: Does you Honor understand my position?

The Court: I understand it.

Mr. Jacobs: I mean, with respect to the question of this union representing themselves as employees.

The Court: By the same token they might be engaged in an independent contract relationship with some third party which would in like manner not redound to the benefit of the plaintiffs' contention in this case. It is what governs the [172] relationship of the plaintiffs to the news vendors that

(Testimony of William Parrish.)

counts, and not the relationship they might have with somebody else, be it alike or unlike the relationship, the nature of which is at issue here. You may mark it for identification. I will sustain the objection.

Mr. Jacobs: What was the last question? I will state the offer of proof.

(The reporter read the last question.)

Mr. Jacobs: The Government offers to prove that the People's World is sold by the vendors of the union here in question at the same time, at the same place and under the same circumstances as the newspapers published by these plaintiffs and are among the publications mentioned by this witness on direct examination.

The Court: You already have in evidence much of what you have stated in your offer of proof. The witness has already stated that the news vendors do sell this publication.

Mr. Jacobs: That may be, your Honor.

The Court: You have made your position clear in the record.

Mr. Jacobs: Yes.

Mr. Fink: If your Honor please, while there is an interruption, I have in mind that this morning I made two offers of proof, and just to perfect the record, may the record show that the Court denied leave to pursue that line of examination [173] on the offers?

The Court: Very well.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Mr. Parrish, has the union of which you are Secretary and Treasurer entered into collective bargaining agreements with the California Sports Service, Inc.? A. Yes.

Q. Have you a copy of that contract?

A. There is no copy of the first agreement available, Mr. Jacobs, but I have a copy, one of the 1942 agreement, which is, I would say, essentially, for the purpose of comparison, is the same as the first agreement. As a matter of fact, I don't know when the first agreement was signed by these people.

Q. Is the document which you hand me the contract of which you speak?

A. That is right, California Sports Service.

Mr. Jacobs: Mark this for identification, please.

The Clerk: Defendant's Exhibit H for Identification.

Mr. Jacobs: The Government makes the same offer to introduce in evidence Defendant's Exhibit H and makes the same offer of proof.

Mr. Fink: To which we object upon the ground that it is incompetent, immaterial and irrelevant, it sheds no light upon the issue here before the Court.

Mr. Jacobs: Your Honor has already ruled on it.

The Court: Yes.

Mr. Fink: I just wanted the formal objection. It is as to us pure hearsay.

The Court: The Court will make the same ruling with respect to this contract. That is on the theory that it is being offered for the same purpose as the other was.

(Testimony of William Parrish.)

Mr. Jacobs: Yes, your Honor.

The Court: Very well.

Q. (By Mr. Jacobs): Mr. Parrish, has the union, of which you are Secretary and Treasurer, entered into a contract with the Al Greenstone Distributing Company? A. Yes, we did.

Q. Have you a copy of that contract?

A. I have.

The Court: Before you proceed with that, does the contract which you have just had marked for identification refer to newspapers and periodicals, or some other commodities?

Mr. Jacobs: I didn't want to burden the Court with that.

A. It involves hot dogs, peanuts and beer. That is, the vendors at the ball park, your Honor.

Mr. Fink: That has a lot to do with this case.

The Witness: One of them, or two of them, rather, sell programs. The others——

Mr. Jacobs: To make the record clear, Mr. Parrish, I am referring to publications sold under Defendant's Exhibit H for Identification and published by California Sports Service [175] Incorporated. What publications are produced and sold by the union vendors under this contract?

A. The only thing that could be, would be the program.

Q. Is that all there is?

A. Yes, programs and score cards.

Mr. Jacobs: Mark this for identification, please.

The Clerk: Defendant's Exhibit I for Identification.

(Testimony of William Parrish.)

Mr. Jacobs: I show you Defendant's Exhibit I for Identification and ask you if you recognize it?

A. Yes, it is the contract with Al Greenstone.

Q. What publications are produced by Al Greenstone? A. They didn't produce any.

Q. Have any publications ever been sold by the union news vendors under this contract?

A. Under that contract, yes.

Q. What publications were they?

A. View books, guide books and postcards, and various items that are on sale over at Treasure Island and on the ferry boats operating to and from.

Mr. Jacobs: The Government offers in evidence Defendant's Exhibit I for Identification and makes the same offer of proof.

The Court: For the same purpose?

Mr. Jacobs: Yes.

The Court: You make the same objection? [177]

Mr. Fink: Same objection, your Honor, yes.

The Court: Same ruling.

The Witness: I would like to change my testimony in one respect, your Honor. The people engaged in selling programs—that was the only thing that was touched on—with the California Sports Service are a group that is set apart from the news vendors. The people who sold view books, guide books and so forth, on Treasure Island were also another group that were set apart. They held their own meetings and so forth. We negotiated for them by reason of the fact that the Labor Council requested us to do so.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Are the vendors who sell those publications members of the union of which you are Secretary and Treasurer?

A. They were given membership, but on a limited basis; they couldn't go out and take a contract to sell papers.

Q. Mr. Parrish, is the statement you just made true with respect to the People's World?

A. No, I named the two contracts that I had reference to.

Q. Did the union, of which you are Secretary and Treasurer, enter into any other contracts for the sale of publications with any other publisher or organization?

A. The Oakland Ballpark, Mr. Greenstone only had that distributing concession for a period, I think, of about two months, and he folded up, and to be frank with you, I can't [177] remember the name of the company that was actually producing the stuff, but they took it over themselves and distributed themselves. They put a Mr. Woodward, or something like that, over there.

Q. Maybe you didn't understand my question, Mr. Parrish. Is there any other organization—organization other than the ones mentioned in Defendant's Exhibits G, H and I—with which the union entered into a contract for the sale of publications?

A. We have a contract with Iceland during the Ice Follies out there; they sell this big program, if you call that a publication.

(Testimony of William Parrish.)

Q. Is there any other organization?

A. I don't know whether Sam Miller handles any programs or not. If he does, we handle the programs for Sam Miller.

Q. Have you any contract with any organization which distributes magazines? A. No.

Mr. Jacobs: May this be marked for identification, please.

The Clerk: Defendant's Exhibit J for Identification.

Q. (By Mr. Jacobs): Mr. Parrish, I show you Defendant's Exhibit J for Identification, and ask you what it is?

A. It is a report of the 1937 negotiations committee which was given on July 25th, which, to the best of our ability, outlined the actions of the committee since the committee was first formed. [178]

Q. I observe on the top of it——

Mr. Fink: Pardon me. Do you mind letting me see what you are examining about?

The Court: I think you should show it to counsel.

(The document was handed to Mr. Fink.)

Q. (By Mr. Jacobs): Referring——

A. There is one error in that, Mr. Jacobs; it was delivered Sunday, October 1st.

Q. October the 1st?

A. Yes. I don't know how that date got on there, but it was delivered Sunday, October 1st, according to the minutes.

(Testimony of William Parrish.)

Q. Delivered to whom.

A. To the membership.

Q. And did they take a vote on it?

A. They did.

Q. And did they approve it? A. They did.

Mr. Jacobs: The Government offers in evidence Defendant's Exhibit J for Identification.

Mr. Fink: To which we object upon the ground that it is incompetent, immaterial and irrelevant, and that the negotiations on reports of committees of the union are not binding upon us; on the further ground that whatever the negotiations were, they were merged into the written contract which is now before you for interpretation.

Mr. Jacobs: If I might say so, it seems peculiar to hear that objection on those particular grounds from Mr. Fink, because the whole subject of the direct examination of plaintiffs [179] has been directed to show the negotiations. He has stated his contention that it was the intention of both parties to the contract to create the relationship of buyer and seller and not that of employer and employee, and this document, properly identified by this witness, contains a statement directly bearing on that, that I would like to read to this court.

The Court: Neither side went into the actual nature, the actual details of negotiations. It has been already brought out that there were negotiations on the various subjects that were covered in the contract; that the parties had different ideas, and that they finally came to an agreement. This

(Testimony of William Parrish.)

witness has already testified—if not this witness, the other witness who was on the witness stand—that at first the union wanted an employee contract, but that later they accepted the other form of contract. Now, what more can you show than that?

Mr. Jacobs: I am proposing to show by this statement, your Honor, that that was not the belief of the union. It is plaintiffs' contention, based on a statement in the contract and the testimony of their witness, that they accepted this as a condition and that it represents the genuine belief of the union of the relationship created, and this statement directly contradicts the statement of this witness, as well as Mr. Bitler. [180]

The Court: Maybe my memory is faulty, but I understood either this witness or the other witness, or both of them, to say that when the first negotiations took place that the union was asking for an employee contract, and that later when the publishers wanted this kind of a contract, that they finally acceded to it. That is already in the record. Am I incorrect about that?

Mr. Jacobs: That is right, your Honor.

Mr. Fink: You are correct.

The Court: That being so, what more do you need to show in that regard?

Mr. Jacobs: I think Mr. Fink will contend, certainly, that the belief of the parties—and he has so stated that the belief of the parties, that the intention of the parties, or the relationship is relevant—the belief of both parties. I believe he has asserted

(Testimony of William Parrish.)

that in one form or another. Now, that belief must be genuine, honest, frank belief of the relationship created.

The Court: The union may have had a belief to that effect at the time they first entered into the negotiations, but they didn't mutually enter into a contract to that effect.

I may have a dispute with you and have an honest belief that you owe me ten dollars, and then after we have negotiated a while I sign an agreement with you in which I accept five dollars. Now, our agreement is the agreement for \$5.00. [181] That is how disputes, if they are settled, how they finally end.

Mr. Jacobs: Let me carry your Honor's analogy applied to this case. But whether a debt actually existed may be determined by whether I thought I owed you it or because I just wanted to argue about it. This statement here tends to show that there was never any belief on the part of the union—never a belief that they were employees.

The Court: You mean at that time?

Mr. Jacobs: No, after the concession was made. After the concession was made. This is a statement made as to why they conceded the point, why they acquiesced in the demand.

The Court: You mean that the document that you have here indicates a construction of the contract that the union put on it after it was executed?

Mr. Jacobs: After this clause was agreed to by the union representatives in negotiation.

(Testimony of William Parrish.)

The Court: You mean that they then stated why they did it?

Mr. Jacobs: Yes. I think, if I read the statement, I am sure your Honor will——

The Court: Let me see the document, then I can pass on it. Indicate the part.

Mr. Jacobs: Read to this point (indicating).

The Court: I didn't so understand—— [182]

Mr. Fink: This is merely a report of a committee, if your Honor please, this isn't a union action; this is a report of a committee.

The Court: This report was rendered after the parties had come to an agreement.

The Witness: No, sir.

Mr. Jacobs: Did you say what date that was rendered?

The Court: He said October 1st.

The Witness: I said August 1st.

Mr. Fink: I think you inadvertently used "October."

The Witness: I what?

Mr. Fink: I was going to correct that.

The Witness: No, I said August 1st.

The Court: You said October. Is that correct?

A. I am sorry, sir. I didn't mean October then.

Mr. Jacobs: In any event, your Honor, you understand——

Mr. Fink: The contract is dated August 31, 1937, your Honor.

Mr. Jacobs: But it indicates after the concession was made in the negotiations.

(Testimony of William Parrish.)

The Court: I will allow it in evidence, that part that you have indicated.

Mr. Fink: If your Honor please, if any part of it is to go in, let us let the whole thing go in.

The Court: What is the offer, first? [183]

Mr. Jacobs: I offered the whole document.

Mr. Fink: To which I object upon the ground that it is incompetent, immaterial and irrelevant; that it sheds no light upon the problem before us; that the negotiations were merged into the contract of August 31, 1937, and that this is merely a report of a committee.

The Court: Well, I will allow the document to be admitted in evidence for the purpose stated by counsel of showing the intent of the labor union in making the contract.

Mr. Jacobs: That is correct, your Honor.

The Court: For that limited purpose.

(Thereupon the document referred to was marked Defendant's Exhibit J in evidence.)

Mr. Jacobs: I also call your Honor's attention to the use of the word "wages" in that statement.

Mr. Fink: If you Honor please, that document is going to do no good to either party unless it is read. There are several parts of it that are material, not only the part which was covered by counsel. If the counsel doesn't want to read it, I will do my own reading, if the Court please.

The Court: I will read the whole document. If you wish it to be read into the record——

(Testimony of William Parrish.)

Mr. Fink: I think the Court should read it or have it read for the record.

The Court: Let the whole contract be in evidence. [184]

Mr. Jacobs: It is in evidence.

Mr. Fink: It is not a contract; it is a report.

The Court: The entire report.

Mr. Fink: I point out to the Court, for the purpose of the record, that I was denied the right of going into this matter that counsel is now going into. Upon his objection, I was denied the very right counsel is now permitted to go into, and it will prolong our trial, your Honor. I am sorry, but if we are going into these matters that were so far behind the August 31st contract, I necessarily will have to cover them.

The Court: Well, of course, this arises on the cross-examination of the witness.

Mr. Fink: I understand, your Honor.

The Court: And I am not going to cut off cross-examination on a material matter any more than I would your cross-examination. You examined the witness, and if I recall correctly, in your direct examination you took up certain subject matters in the contract and asked him if there was a bona fide dispute about them, and if finally, as a result of going back and forth, they resolved the—they finally came to a contract as a result of resolving these conflicting points of view, and the witness said "Yes."

Now, in cross-examination counsel is entitled to bring out the motive and intent that was behind the final resolution [185] of any of these matters.

(Testimony of William Parrish.)

Mr. Fink: I attempted, your Honor, to go into the motive and intent and the detail of the negotiations, and the Court wouldn't permit it.

Mr. Jacobs: Shall I proceed?

The Court: Go ahead.

Q. (By Mr. Jacobs): Mr. Parrish, on how many occasions has the News Vendors Union voted to strike, or voted to call a strike, against either the San Francisco Examiner, the Chronicle, or the Call-Bulletin?

Mr. Fink: I submit that it is immaterial, if your Honor please, and object to it upon that ground.

The Court: I think it should be confined to the period in question.

Mr. Jacobs: To the years 1937 to 1940.

The Court: For that purpose, I will allow it.

A. '37 to '40? A strike vote was taken on the date of August 1st when this communication was delivered to the union, which resulted in a vote of 325 yes and 81 noes, 3 not voting.

The Court: That date, please?

A. August 1st.

Q. What year? A. 1937, sir.

Q. (By Mr. Jacobs): That is a vote to strike?

A. Yes.

Q. Proceed. Is that the only one?

A. On April the 14th, 1940, a strike vote was taken. Then, [186] in the 1939 negotiations there was a strike vote taken. It is in the minutes, your Honor; I wasn't able to find it, but I know that it is there. I know that we took the strike vote.

(Testimony of William Parrish.)

The Court: When you say "strike vote," what do you mean by that?

A. Well——

Q. (By Mr. Jacobs): Did your membership favor a strike?

A. The manner in which you do it, you empower—the union empowers the negotiating committee to call a strike if settlement can't be obtained.

The Court: Was that done on the occasions that you have mentioned?

A. Yes, sir. Then, your Honor, you have to go to the Labor Council, and at that time we had to go to the American Federation of Labor, for sanction.

Q. (By Mr. Jacobs): Now, turning for a moment, Mr. Parrish, to your own history as a news vendor, have you ever followed any other trade or occupation besides news vending? A. Yes.

Q. What other trades or occupations have you had? A. Construction worker.

Q. Have you been a member of any other union?

A. Laborer's Union.

Q. When you were a member of the Laborer's Union, were you an employee of the person you were working for?

Mr. Fink: Just a minute. Objected to as incompetent, irrelevant and immaterial, your Honor.

Mr. Jacobs: I will withdraw the question.

The Court: I will sustain the objection.

Q. (By Mr. Jacobs): Had you sold any newspapers prior to the time you sold newspapers in San Francisco? A. Yes.

(Testimony of William Parrish.)

Q. Where and for what periods?

A. A very short period of time in Chicago, I think for a period not exceeding two weeks; and Portland, Oregon, for a short period of time; and Los Angeles, California, for a short period of time.

Q. When did you first begin to sell newspapers in San Francisco?

A. To the best of my recollection, it was around the latter part of 1930.

Q. What paper did you sell at that time?

A. The Examiner.

Q. Will you state the circumstances under which you came to sell papers for the Examiner?

Mr. Fink: Objected to as incompetent, irrelevant and immaterial, and too remote.

The Court: This is before the period in question?

Mr. Fink: 1930; yes, your Honor.

Mr. Jacobs: I am only trying to trace the history of this witness up to and including the time in question. Moreover, the testimony of the plaintiffs is that the condition before was the same as the condition afterward with respect to the relationship of the parties. We don't think it was. They haven't showed it by this witness. [188]

The Court: Well, I don't recall any testimony to that effect. Was there?

Mr. Jacobs: I thought that was the whole tenor of Mr. Bitler's testimony.

The Court: What difference does it make what relationship they had beforehand? I don't see that

(Testimony of William Parrish.)

that is going to help me to decide the matter. What I have to decide is what is the relationship at the time in question.

Q. (By Mr. Jacobs): On April 1, 1937—I may point out that is just at the beginning of the taxable period—what newspaper were you selling?

A. The Chronicle.

Q. Now, under what circumstances did you come to sell the Chronicle?

Mr. Fink: On what date?

Mr. Jacobs: In——

The Court: He said April 1, 1937.

A. Well, I had been selling at the corner of Powell and Market since the latter part of '34 or the first part of '35, if I recall correctly.

Q. (By Mr. Jacobs): You understand, the question is the circumstances under which you were originally engaged to sell the Chronicle when you were selling them on April 1, 1937.

Mr. Fink: If your Honor please, I submit that question is vague and ambiguous, and object to it on that ground. What is meant by "circumstances."

Mr. Jacobs: I was trying to avoid words which counsel might object to.

Q. Who hired you to sell the Chronicle?

Mr. Fink: Objected to upon the ground that there is no proper foundation laid; there is no showing that anybody hired him.

Mr. Jacobs: That is exactly the point I was getting at. I will repeat the question:

(Testimony of William Parrish.)

Q. Under what circumstances did you come to sell the Chronicle on April 1, 1937?

A. I walked down to the Chronicle and asked the street man if there were any open corners.

Q. Yes.

A. He says, "Not right now, but the man that has Powell and Market is leaving in about a week. If you want Powell and Market, you can have it."

Q. Continue.

A. So, about a week after that I started selling papers at the corner of Powell and Market.

Q. That is the corner you were selling on April 1, 1937? A. That is right.

Q. Now, at that time, on April 1, 1937, will you state generally what supervision and control was exercised by the wholesalers over the street vendors in your position?

Mr. Fink: Objected to upon the ground that the interrogation is obviously for a period prior to the contract, and upon the ground that it calls for an opinion and conclusion [190] of this witness.

Mr. Jacobs: The same opinion and conclusion that was requested of this witness on direct examination. The date, April 1, 1937, is within the taxable period under the plaintiff's own position.

Mr. Fink: I don't care whether it is within the taxable period or not. This contract is what we are seeking to interpret.

Mr. Jacobs: May it please the Court, there is a period of five months within the taxable period

(Testimony of William Parrish.)

when there was no contract in force, and that covers the taxes here in question.

Mr. Fink: I add to my objection the further objection that it is not proper cross-examination, part of the defendant's affirmative case.

The Court: Well, is the plaintiff seeking to recover any taxes for any period prior to the date of the contract?

Mr. Jacobs: The plaintiff, as I understand it from the complaint, may it please the Court, states that the Commissioner of Internal Revenue assessed and collected taxes for the period from April 1, 1937, through the calendar year 1940. If I misstated the complaint, I would like to know it.

The Court: What are you trying to show? That in the period between April and August, 1937, that the plaintiff isn't under any circumstances entitled to recover taxes, because in that period there was unquestionably some sort of an [191] employee relationship?

Mr. Jacobs: That is one of the reasons, your Honor; that is only one of the reasons.

The Court: Isn't that material, Mr. Fink, if in fact you are asking for recovery of taxes for that period?

Mr. Fink: Your Honor, I have——

The Court: I don't know whether you are asking for the recovery of taxes for that period; I haven't examined the complaint thoroughly.

Mr. Fink: I think that the first assessment, may it please the Court, was for a period of April 1,

(Testimony of William Parrish.)

1937, to October, 1937. My objection runs to really another point. I take it that the defendant would have an opportunity to put in an affirmative case for the period April 1 to August 31, but I don't believe it is proper cross-examination. I believe it is incompetent, irrelevant and immaterial at this time.

Mr. Jacobs: May it please the Court, I think it is proper cross-examination, because this man is called as a witness to show that he was an employee throughout the taxable period.

Mr. Fink: That he was an employee throughout the taxable period?

Mr. Jacobs: That he was not an employee.

The Court: The objection that it is not proper cross-examination, [192] I think, is too narrow. I will allow the question.

Mr. Jacobs: Will you read the question, Mr. Reporter?

(The reporter read the question.)

A. I would state as to things that relate to myself personally, but I can't speak for anyone else up until the period of time that we had an organization. And I think I am proper in saying that, your Honor, because——

The Court: That is all right; don't give us a talk on that now. Just, can you tell us the circumstances under which you sold the papers?

A. Yes, sir.

(Testimony of William Parrish.)

Q. All right. What were they?

A. I received the first edition at the corner of Fifth and Market night after night. I believe the press release time was around six o'clock, somewhere in that neighborhood. I began selling at the corner, walked across the street and started selling papers. About seven o'clock, or seven-thirty, the wholesaler, who was Johnny Rapolo, I think was his name, come around and give me more papers, and I would see him during the course of the night seven or eight different times, he would give me later editions, pick up the earlier ones.

At that time the Chronicle didn't leave early editions on the street; whenever they came by they picked up all of the early papers and left the later ones. Generally, Johnny would show up about——

The Court: I don't think that we are interested in that.

Mr. Jacobs: I am not, either.

The Court: I think what you are trying to get at is, you sold the papers and collected the proceeds from the public, to whom you sold them. What were your arrangements with the wholesalers as to your payment for the newspapers? How was the matter handled?

A. At the end of the night, your Honor, the wholesaler came up and I gave him his share and kept mine.

Q. What do you mean by "his share"?

A. The wholesale price of the papers was 3 cents a copy; the retail price was 2 cents.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): You mean 5?

The Court: 5 cents.

The Witness: The retail price was 5 cents; my profit was 2 cents.

The Court: You turned over the 3 cents to the wholesaler? A. That's right.

Q. (By Mr. Jacobs): Mr. Parrish, isn't it true that one of the demands and one of the grievances in your negotiations with the publishers in negotiating for the first contract of August 31, 1937, was that the wholesalers were exercising and abusing their authority over the vendors?

Mr. Fink: Objected to as incompetent, immaterial and irrelevant, and calling for the conclusion of the witness. [194]

The Court: Well, it does, whether they were exercising their authority. I will sustain the objection.

Mr. Jacobs: I will reframe the question.

Q. Isn't it true, Mr. Parrish, that in negotiating for the contract of August 31, 1937, one of the reasons why the union wanted a contract with the publishers was because the membership of the union thought the wholesalers were exercising too much supervision and control over the vendors?

Mr. Fink: Objected to upon the same identical grounds.

Mr. Jacobs: I will strike the words "too much."

Mr. Fink: It is still objected to upon the same identical grounds.

The Court: I will sustain the objection. I can't see the particular relevancy of that.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Prior to August 31, 1937, did the wholesalers give any instructions or orders to the vendors? A. Yes.

Q. Will you state the nature of those orders?

A. I know it from hearsay; I never received any myself.

The Court: Well, then, I don't want to hear hearsay. Let's get on to some other subject. We are wandering off too far now.

Q. (By Mr. Jacobs): You said you were selling at Fifth and Powell.

A. Powell and Market.

Q. Powell and Market. How long did you sell there? [195]

A. Until about—I can tell you better by referring to the minutes, your Honor. The last day that—or the last night, I might say, that I sold papers at the corner of Powell and Market, to the best of my knowledge, was Thursday night, it would be May 27th.

Q. Of what year? A. 1937.

Q. Did you sell papers at another corner thereafter?

A. Yes, I sold papers more or less extra for the period of time of the negotiations.

Q. Where?

A. All over town; I don't recall the corners.

Q. At various corners all over town?

A. Yes, off and on.

Q. On each occasion, did you go to the publishers? A. I beg pardon?

(Testimony of William Parrish.)

Q. In each case did you go to employees of the publishers and ask to sell at those various corners?

A. Well, you see, the wholesaler in the alley; "Have you got anything open?" or "Is there a corner open?" If there was, "How about tonight?"

Q. Prior to August 31, 1937, you dealt with the wholesalers, is that right?

A. In some instances.

Q. In other cases with the street circulation editor?

A. Well, with the street man.

Q. Street man. What is the street man? [196]

A. He is the straw boss, you might say.

Q. Straw boss employed by the paper?

A. That's right. He is over the drivers.

Q. And when did you next get a regular corner to sell papers?

A. The contract went into effect August 31st, I believe. About September 5th I began selling Call-Bulletins at the corner of Bush and Battery.

Q. Was that a newly opened corner?

A. That was a corner that was created, due to the ratio which was established in the agreement.

Q. How long did you continue to sell there?

A. A period of about five weeks.

Q. In that case, you dealt with the publisher in obtaining the corner?

A. Yes, that was the agreement.

Q. Who did you deal with in selling papers on that corner—the wholesaler or some other person?

A. Well, I went down to the alley and asked Tony Baccoccio if there was anything open.

(Testimony of William Parrish.)

Q. Who is Tony Baccoccio?

A. He was the street man for the Call-Bulletin.

Q. Continue.

A. He said, "I got Bush and Battery open." I said, "I would like to have a contract for it." So he gave me one.

Q. Was that a more lucrative corner than you had previously?

Mr. Fink: Objected to upon the ground that it is incompetent, [197] immaterial and irrelevant.

The Court: Well, I will overrule the objection. Yes or no?

A. Yes.

Q. (By Mr. Jacobs): How long did you remain there? A. Four or five weeks.

Q. Four or five months. Then where did you go?

A. Weeks.

Q. Then where did you go?

A. I made a swap with the vendor who was selling Examiners—

The Court: Please, Mr. Parrish; this Court has a lot of cases to try, a lot of litigants waiting, and while this controversy is very important to you gentlemen, other people have to have their day in court. So please answer just precisely the question asked.

The Witness: Yes.

The Court: Even though you would like to talk about it—I can understand that—but just answer the question precisely and let's move along a little faster.

A. The S. P. Depot for the sale of the Examiner.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Who did you deal with there? How were you engaged to sell at that corner?

Mr. Fink: Object to the form of the question. He wasn't engaged by anybody.

Mr. Jacobs: I am trying to pick the least provocative word. [198]

The Court: Who, if anyone, did you make arrangements with?

A. I arranged the deal to swap corners with Mr. Cassidy, who was the circulation manager.

Q. (By Mr. Jacobs): Who was on that corner previously? A. Harry Rogers.

Q. And he was transferred to another corner?

A. He went to the Bush and Battery corner that I was selling at; it was a swap.

Q. That was arranged with Cassidy, who was the circulation editor of the San Francisco Examiner?

A. The circulation manager.

Q. And how long did you remain there?

A. Until the signing of the 1939 agreement.

Q. Then where did you sell papers?

A. 24th and Potrero.

Q. Who made arrangements for you to sell there?

A. The corner became vacant. I was asked if I desired a contract for the corner, and I accepted it.

(Testimony of William Parrish.)

Q. Who asked you?

A. I believe again Mr. Cassidy of the Examiner.

Q. How long did you remain there?

A. I remained there until, I think, April of 1940, the early part.

Q. Then what did you do?

A. I became business representative of the union. [199]

Q. Did you cease selling papers?

A. That's right.

Q. When did you recommence selling papers?

A. On my return from the Island in 1942.

Q. Where did you sell papers then?

A. I had what is commonly called a swing.

Q. A what?

A. A swing. A swing. I had a swing corner.

Q. Yes. Which means what?

A. One night at one corner, another night at another corner. You see, the corners are set up on the basis of six days, your Honor, and the seventh day we operate swings.

Q. Who engaged you to sell on the swing?

Mr. Fink: Object to the form of the question.

Q. (By Mr. Jacobs): Who arranged——

The Court: With whom did you make arrangements for that?

A. The business agent of the union.

Q. (By Mr. Jacobs): Did he submit your name to the publisher?

A. I don't know how he done it; he just told me to go, so I went.

(Testimony of William Parrish.)

Q. When did you next get a regular corner?

A. When Mr. Reilly, who was selling the Bridge Terminal, went into the service I was given the contract to sell at the Bridge Terminal, Examiners only.

Q. That was a lucrative corner, was it not?

A. I beg pardon? [200]

Q. That was a lucrative corner?

A. Yes, that was.

Q. And the vendor who was occupying that corner eventually came back from the service, did he not? A. That is right.

Q. And he requested to be restored to that corner, did he not?

Mr. Fink: Just a moment. If your Honor please, that is objected to as incompetent, immaterial and irrelevant, being improper cross-examination, and shedding no light on this controversy whatever.

The Court: I will overrule the objection. You may answer.

A. The fact that he wanted his corner?

Q. (By Mr. Jacobs): Yes.

A. Why certainly.

Q. And you had to give up the corner, did you not? A. It is part of the agreement.

Q. With whom? What agreement?

A. Part of the agreement with the publishers.

Q. Between who and the publishers?

A. The union.

(Testimony of William Parrish.)

Q. You were sent to another corner, were you not?

A. Well, I obtained another corner.

Q. Was there a man on the corner you obtained?

A. No, the corner was a vacant corner.

Q. Mr. Parrish, starting with the day's routine in the sale of papers, do I understand you correctly the runner comes up with the first edition and drops fifty papers, is that correct?

A. That is correct. [201]

Q. And that is automatic, isn't it?

A. Yes.

Q. Is that the wholesaler who delivers—the runner, or is it the wholesaler himself who delivers the papers on that first fifty?

A. No, it isn't the wholesaler for the district; it is what we know in the trade as a runner.

Q. He is an employee of the publishers passing by?

A. Yes.

Mr. Fink: You must answer the question. Shaking the head doesn't mean anything.

A. Oh, pardon me. Yes.

Q. (By Mr. Jacobs): It is my understanding, under the 1937 contract that when you or anybody else is engaged to fill a full time corner, you are engaged to work a week of forty-eight hours, six days a week, is that correct?

Mr. Fink: Objected to upon the ground that the contract speaks for itself; secondly, upon the ground that the form of the question is an attempt

(Testimony of William Parrish.)

to put words in the witness' mouth to which he has not testified.

The Court: The first ground of the objection is good. I can read that in the contract, too.

Q. (By Mr. Jacobs): Do you know what time, under your contract, you were expected to be on the corner at which you had the contract to sell papers? A. Yes.

Q. That is the time the runner is dropped, is it not? A. No, not necessarily. [202]

Q. What time were you expected?

A. Press release time.

Q. Is that the time the papers come off the press, or the time the papers come to you?

A. That is the time—I don't know exactly how to explain it, your Honor. We have what we call—we always consider press release time. The papers might roll off the press twenty-five or thirty minutes before that, but these papers make agreements between each other whereby they agree that they will not sell prior to a certain time.

Q. Are you expected to be on the corner prior to the time that papers can be sold? I haven't got it clear in my mind, Mr Parrish. A. No.

Q. What is that? A. No.

Q. I am not clear in my mind when you are expected to be on the corner under the contract.

Mr Fink: Expected by whom?

Mr. Jacobs: Expected by the person with whom you have the contract, the publisher.

(Testimony of William Parrish.)

Mr. Fink: If that is the case, I object to the question upon the ground that the contract speaks for itself.

The Court: I think it does. When do you get to the corner? Let me decide that. Just tell me the fact.

A. If the time starts a quarter to six, I walk over to the corner about quarter to six, your Honor.

Q. In the morning? A. No, at night.

Q. At night? A. Yes.

Q. (By Mr. Jacobs): Are the papers usually dropped at that time?

A. Generally, the Examiner is already there.

Q. The original order of fifty copies is left in a bundle? A. Yes, sir.

The Court: Perhaps we had better take the afternoon recess at this time.

(Recess.)

Q. (By Mr. Jacobs): Mr. Parrish, you testified from time to time you have contracted to sell papers on new corners—corners which were new to you. How did you learn when the papers would be dropped at that corner?

A. Well, that is simple.

Q. That may be simple for you.

A. The starting times for all corners over the entire city are the same.

Q. Do you mean the papers are delivered simultaneously to all the corners? A. No.

(Testimony of William Parrish.)

Q. What you mean, you are expected to be on the corner at the same time, press release time?

A. If any papers arrive there after press release time, prior to the time that he arrives there and they are lost, he is responsible for them.

Q. All vendors, including yourself, are expected to be at the corner at press release time? [204]

Mr. Fink: Objected to upon the ground that the question is vague and ambiguous. Expected by whom?

Mr. Jacobs: I am trying to establish the time of beginning. The point was brought out this morning that it was the same for all corners. All I am trying to establish is when the work day begins.

The Court: When does the working day begin? Was that uniform at all times at all corners?

A. Yes, it is.

Q. Most of the vendors all get there about the same time?

A. The beginning time is uniform, city-wide. Then the finish is the same.

Mr. Jacobs: When does the working day end?

A. You begin at quarter to six. Your sales period ends at 1:30, I believe.

Q. When do you normally receive your last delivery of papers?

A. At the present time I receive it——

Q. No, at the time of which you speak.

Mr. Fink: What time is that, counsel?

Mr. Jacobs: I presume we are addressing this to the years 1937 to 1940. I think the witness indicated he understood.

(Testimony of William Parrish.)

A. I am sorry, I didn't understand your question. The year 1937, your Honor, to the year 1940, press release time was 7:15. [205]

Q. That is when the working day began, is that right?

A. That is when the sales period began.

Q. When did it end?

A. It was concluded at 3:15 during the years 1937, and in 1939, when the new agreement went into effect which changed the hours from forty-eight to forty-six, there was a twenty minute chop off.

Q. Is the sales period the same on Saturday as it is daily? A. No.

Q. What is the difference?

A. Well, the sales period during that period of time Saturday began at five and was completed at three or four.

Q. In the year 1937, for example, how long before the end of the sales period would you receive your last delivery of papers?

A. Your last delivery would be what is commonly called the midnight edition, which comes out some time around midnight.

Q. With respect to Saturday?

A. The same thing.

Q. Now, when you received your first fifty by the runner, there was no payment made to the runner, was there? A. No.

Q. How soon thereafter would you see the wholesaler?

A. Possibly thirty-five to forty minutes.

(Testimony of William Parrish.)

Q. He would give you some more papers, would he not? A. That is right.

Q. No payment was made at that time, was it?

A. If he wanted payment for the amount of papers I had sold up to that time, I would have to pay him.

Q. If he demanded payment, you would pay for the amount of papers which had been sold?

A. That's right.

Q. Was that the contract?

A. I say it could be done; it isn't the practice.

Q. In fact, it never has been the practice, has it?

A. In some instances.

Q. On busy corners?

A. No. A man looks like he might get drunk.

Q. That has happened?

A. Yes. In some of these records that you asked for you will see what I mean.

Q. The wholesaler would go on and complete delivery to his district after he left you, is that right? A. That's right.

Q. Frequently he would return by your corner, would he not? A. It has happened.

Q. And frequently he would stop, would he not, to see whether you had enough papers?

A. Sure.

Q. And you would consult together to determine whether more papers were needed, would you not?

A. That's right.

Q. And has it happened on occasion, Mr. Parrish, that you have had a surplus of papers which

(Testimony of William Parish.)

you did not think you could sell and made arrangements with the wholesaler that he would take some of those back and deliver them to people who did [207] need them for sale?

A. That has been done.

Q. After the delivery of the first edition by the wholesaler and after he came back, when would you next see him?

A. I am afraid I didn't get that question.

Q. After you saw the wholesaler on the first delivery and after he had returned by your corner to see whether you needed any more papers, what would be the next time thereafter that you saw him?

A. The next edition.

Q. How much later would that be—still thinking of 1937?

A. 7:15; about quarter to 9:00—I would say 8:30 or quarter to 9:00.

Q. How much of a gap was there between delivery of the first and second editions?

Mr. Fink: I submit that that is a mere matter of computation.

A. An hour and fifteen or an hour and a half.

Q. (By Mr. Jacobs): Would you see him between that time at all? A. Well—

Q. He checks back over his route, doesn't he?

A. Not necessarily. He might come back by the corner on his way in to the plant.

Q. He would deliver you some more papers on the second edition. Did you make any payment for the papers at that time?

(Testimony of William Parrish.)

A. If he asked for it, I would. It has never been the practice during the week—— [208]

Q. In your experience——

Mr. Fink: Just a minute. Let the witness answer the question.

Mr. Jacobs: I thought he had.

A. I has never been the practice during the week. At one time it was a definite practice on Saturday nights alone.

Q. What period was that?

A. That runs back over the years before the first contract up until—I believe we even had some of it during the war. It is more or less——

Q. In your personal experience, it wasn't the practice?

A. I used to pay for my papers at the Bridge Terminal whenever I got them, that is, on a Saturday. It saved me a lot of trouble.

Q. Thereafter, when would you get the next delivery of papers?

A. I would say around 10:30.

Q. And between the second and third edition—is that next delivery another edition?

A. 10:30 would be another edition, yes.

Q. Isn't it true that between the second and third edition the wholesaler would check back over the corners in his district to see whether they needed papers?

A. Not necessarily.

Q. It has been done, hasn't it?

A. Oh, yes.

(Testimony of William Parrish.)

Q. And he might check back over that wholesale route several times? That has been done, too, hasn't it? [209]

A. I don't know how he would do it several times.

Q. The third edition you are speaking of, is that the last edition you receive? A. No.

Q. You receive another edition at what time?

A. Some time around midnight; generally about 12:15 or 12:20.

Q. Then between the third edition and the midnight edition, you have seen the wholesaler come back to you to check whether you had sufficient papers or too many papers?

A. I have seen him go by the corner.

Q. He has consulted with you personally, has he not?

A. He would drive up and say, "Have you got enough?"

Q. Based upon your experience as a news vendor and business agent and Secretary-Treasurer of the Union, isn't it the uniform practice for the wholesalers to obtain payments of the alleged wholesale price from the vendors some time after delivering the last edition and before the end of the sales period? A. That's right, yes.

Q. Hasn't that been the practice?

A. Since——

Q. No, in the period 1937 to 1940? A. No.

Q. When was——

A. Not the general practice. It did happen, though.

(Testimony of William Parrish.)

Q. I read to you from the 1940 contract, Section 9:

“It is agreed that the present practice of making payment toward the end of the selling period or after each edition shall be continued.”

A. That's right.

Q. So it was one of the established practices to collect towards the end of the selling period and after the delivery of the last edition?

A. Your question was whether or not on the delivery of the last edition did we pay?

The Court: No, no, he said after the delivery of the last edition.

Mr. Jacobs: And before the end of the selling period.

The Court: And before the end of the selling period.

A. Oh, yes, that is correct; but I think that the 1940 agreement also carries an arbitration award which changed that to a great extent.

Mr. Jacobs: That may be.

Mr. Fink: Counsel, may I interrupt just a moment? What Section are you reading—the 1940 agreement?

Mr. Jacobs: Yes.

Mr. Fink: What section?

Mr. Jacobs: Section 9a, the second sentence.

Mr. Fink: Section 9a. If your Honor please, this isn't very important, but there is an optional

(Testimony of William Parrish.)

provision there. The section reads—the sentence of the section reads:

“It is agreed that the present practice of making payment toward the end of the selling period or after each edition shall be continued.”

Mr. Jacobs: Are you suggesting that I didn't read it as [211] you read it, Mr. Fink?

Mr. Fink: I am suggesting that your question did not incorporate the whole sentence.

Mr. Jacobs: I want my statement read to the Court.

The Court: Don't get excited.

Mr. Jacobs: That is the second time I have been accused of a misstatement to this court.

Mr. Fink: I didn't accuse you of a misstatement. I said your question did not include the alternative. There is an option in the sentence.

The Court: Go ahead.

Mr. Jacobs: I will withdraw it.

The Court: Ask another question.

Q. (By Mr. Jacobs): Now, that period of making payment for papers between the delivery of the last edition and the end of the sales period is known as the check-in, is it not?

A. That's right.

Q. Now, at that time the news vendors pay a specified amount for each paper which has been sold, is that right?

A. Pays for the amount of papers that he sold, yes.

(Testimony of William Parrish.)

Q. Yes. There is no payment made for papers which have not been sold?

A. Under the section which you read there, the vendor has an alternative; he can check in all of his papers, yes.

Q. I am talking about the practice in actual operation. [212]

A. That was put into operation—that was the arbitration award which I spoke of, which is part of the section which you read, Mr. Jacobs.

Q. You mean to suggest that nobody ever paid for just the papers which had been sold?

A. Well, I can't answer for everybody.

Q. Aren't you familiar with the practice as business agent?

A. I would say that the practice was, if the vendor did check in early, was to pay for all of the papers.

Q. Now, Mr. Parrish, at the time of checking in—the checking in was done by the wholesaler, was it not? A. That's right.

Q. The wholesaler and the vendor would consult as to the number of papers which would be needed for the remainder of the selling period, would they not?

A. The vendor would say, "I will keep out so many," and pay for whatever the thing called for.

Q. The papers he kept are known as the holdout, are they not? A. That is right.

(Testimony of William Parrish.)

Q. Was any accounting made for papers upon the amount of unsold papers held out on the following day? A. You get credit for them.

Q. On the following day?

A. That's right.

Q. He contacted the wholesaler at that time and if he had not made payment for the papers he would pay for those which had [213] been sold and get credit for the papers unsold?

A. The general practice upon returns from the night before, from Tuesday checking and on Wednesday night you hand those papers back, they are returns.

Q. Does that practice prevail on Saturday night, too?

A. Saturday night you check in complete.

Q. What do you mean by that?

A. Well, they have special wholesalers on Saturday night who come around and pick up the returns and check you in complete. When you check in Saturday night, there is no more.

Q. At the end of the selling period——

Mr. Fink: Just a minute. Let him answer the question.

A. When you check in on Saturday night, you are through.

Q. (By Mr. Jacobs): These special wholesalers you are speaking about, check you in at the end of the selling period?

A. As close to it as they can, but when they do check you in they check you in complete.

(Testimony of William Parrish.)

Q. Now, Mr. Parrish, with respect to the amount of the papers that the vendor receives from the wholesaler, now, in your experience, when you first went to a new corner didn't you ascertain from the wholesaler what the normal sales were at that corner? A. Yes.

Q. That is, the normal sale is known as the draw, is it not? A. That is correct.

Q. And the wholesaler would deliver this corner five hundred [214] or a certain number, is that correct? A. That is right.

Q. Now, did I understand you correctly to say that frequently papers would be dropped before the beginning of the selling period at the corner?

A. That is correct.

Q. Isn't it also true, Mr. Parrish, that when a good story breaks—by a good story, I mean a story which might sell a lot of papers, breaks, that the first edition that the wholesaler drops at the corner, he drops an additional number of papers which he thinks the vendor can use at that corner?

A. Why, certainly.

Q. And by the same token, if the day turns out to be rainy he drops a lesser amount of papers, doesn't he? A. Not necessarily.

Q. But he has frequently done that?

A. You don't understand selling papers, I guess.

Q. That is what I am trying to find out, Mr. Parrish.

A. The weather, except certain corners, has nothing to do with the sale of papers, Mr. Jacobs.

(Testimony of William Parrish.)

Q. In other words——

A. There is a normal sale on the corner day in and day out, whether it rains or whether the sun shines.

Q. I see; but good stories will affect the situation?

A. Oh, no, you were talking about good stories and weather; I am talking about normal sales.

Q. Now, Mr. Parrish, at the end of the checking in [215] period—you identified a sales slip that you got from the Chronicle, I believe, did you not?

A. I think that was a consolidated sales slip, Mr. Jacobs, if I am not mistaken.

Mr. Jacobs: May I have the exhibit?

Mr. Fink: About 46; somewhere around there. Two of the very small slips. They are all the same.

Q. (By Mr. Jacobs): I show you Plaintiffs' Exhibit 46, which reads: "Chronicle sold"——

A. Read the rest.

Q. Also it says, "Examiner sold."

A. All right.

Q. Did you sell Call-Bulletins on your corner?

A. We are talking about 1937 now?

Q. 1937 to 1940.

A. Well, during that period of time I sold Call-Bulletins and also sold the Examiner, and also sold the Examiner and Chronicle.

Q. Now, when you sold two papers, would the Chronicle wholesaler fill out the Chronicle portion of it, and the Examiner——

A. During that period of time we did not have that type of sales slip.

(Testimony of William Parrish.)

Q. What type of sales slip did you have?

A. It was somewhat similar—that is, the Examiner was similar to that, with the exception that it didn't carry the word "Chronicle" in the right-hand corner.

Q. Just a minute. I think I can show you a sales slip.

May this be marked for identification, please?

The Clerk: Defendant's Exhibit K for Identification.

Mr. Fink: May I see what form you are using, Mr. Jacobs?

Mr. Jacobs: I will give you one.

Mr. Fink: Thank you.

Q. (By Mr. Jacobs): I show you defendant's Exhibit K for Identification, and ask you if you recognize it?

Mr. Fink: You don't have to. I will stipulate that is one of the forms used.

Mr. Jacobs: I want to have it identified, anyway.

A. This is a Chronicle sales slip, but it isn't the sales slip that was in use in 1937.

Q. Was it in use any time in 1937 to 1940?

A. I wouldn't answer that, Mr. Jacobs. I think that very properly could be asked from the circulation manager, because I don't recall the sales slip of that time. As a matter of fact, I will directly state that the Chronicle did not, to my knowledge, use that sales slip.

(Testimony of William Parrish.)

Q. Did they use a sales slip containing the same information?

A. Yes, their sales slips had the amount out, amount sold, amount returned.

Mr. Jacobs: The Government offers in evidence Defendant's Exhibit K.

Mr. Fink: No objection; there is one in already. They are substantially the same.

Mr. Jacobs: I do not agree with him, your Honor. The [217] other one is a joint sales slip.

The Court: It may be marked.

(Thereupon the sales slip referred to was marked Defendant's Exhibit K in evidence.)

Q. (By Mr. Jacobs): Isn't it true in the years 1937 to 1940 that the wholesaler who brought the other papers would also deliver to you a sales slip containing the same information at the time you checked in?

The Court: He wants to know if the wholesalers from the other newspapers used a slip substantially containing this data?

A. I don't get the meaning of the question, your Honor. If I was on the Call-Bulletin—if I was selling the Call-Bulletin, I received a Call-Bulletin sales slip. If I was selling the Examiner, I received an Examiner sales slip.

Q. They were all substantially alike?

A. Yes, they all contained more or less the same, with the exception of the Call, which had very little.

Mr. Jacobs: Will you stipulate——

(Testimony of William Parrish.)

Mr. Fink: You don't have to examine on it. I will stipulate it was in use.

Mr. Jacobs: Mark that, please.

The Clerk: Defendant's Exhibit L for Identification.

Mr. Jacobs: Counsel stipulates that Government's Exhibit L is a form of sales slip in use during the period 1937 to [218] 1940.

Mr. Fink: Used by the Call-Bulletin, as I remember, yes.

The Clerk: You are offering this?

Mr. Fink: I call attention to the fact that this one is dated 194 blank. I will stipulate it was in use, or one substantially the same was in use.

(Thereupon the sales slip referred to was marked Defendant's Exhibit L in evidence.)

Q. (By Mr. Jacobs): In any event, Mr. Parrish, at the end of the time on the check-in you would get a sales slip from the wholesaler from each paper?

Mr. Fink: Each paper that he sold.

Mr. Jacobs: I don't see how he could get one from one he didn't sell.

Mr. Fink: For heaven's sake! He has told you he didn't sell all papers.

Q. (By Mr. Jacobs): Now, Mr. Parrish, you stated that you had seven weekly customers from whom you collected weekly, is that correct?

A. Yes.

Q. What period was that? A. 1937.

(Testimony of William Parrish.)

Q. 1937. At that time how many papers were you selling daily, approximately?

A. I was making a little bit better than the guaranty—a little bit better than the guaranty.

Q. Do you know how many papers that involves? [219]

A. Well, it involved some \$15.00 a week.

Q. If my mathematics is good——

A. You want to remember there is Saturday night in there, Mr. Jacobs.

Q. Daily, I am talking about. Do you remember daily how many papers you would sell?

A. I would have to average better than two dollars and a half a day to make \$15.00. I do not recall the exact number of weeks.

Q. Two and a half a day would mean 125 papers, would it not, approximately? A. Yes.

Q. Mr. Parrish, you stated on direct examination that you never received any orders or instructions from the employees of the papers for whom you sold papers. What occasion would there be, if any, for receiving these orders?

Mr. Fink: Objected to upon the ground that it is calling for an opinion and conclusion of the witness.

Mr. Jacobs: I can't think of anybody better qualified to give that opinion. This is cross-examination.

Mr. Fink: I will withdraw the objection.

The Court: All right.

(Testimony of William Parrish.)

A. There would be no occasion—or, I might say, there has been no occasion since I have been selling for orders or instructions to be given.

Q. (By Mr. Jacobs): Now, you stated on direct examination that prior to 1938—and correct me if I am wrong—during [220] the time the union contract was in force, whenever there was a vacant corner the publisher would call up the business agent of the union and ask them to submit names of vendors available, is that correct?

A. No, I didn't testify to no such thing.

Q. Do you remember your testimony on that point?

A. I testified that prior to the conclusion of the 1938-39 negotiations, that under the terms of the agreement the vendors went to the alleys and received their contracts there.

Q. Let me ask you, Mr. Parrish, whether you testified or not, isn't it true that in 1937 whenever a corner became vacant the representatives of the employees of the publishers would call up the representatives of the union and ask them to submit names of union members?

A. No, that is not correct; it is not the practice.

Q. How were the vendors obtained for new corners or vacant corners?

A. The vendors would go down to the alley and find out if there was any vacancies and if there was a vacancy, apply for it.

(Testimony of William Parrish.)

Q. The vendors would go down into this alley?

A. Yes.

Q. By the alley, you mean the premises adjoining where the papers came off the press?

A. That's right.

Q. And isn't it true today, Mr. Parrish, that from time to time the employees of the publishers call up the business [221] agent of the union and state to him that a certain vendor has not reported, or a certain corner is not filled, and ask you to furnish one?

A. Certainly, that is the contract.

Q. Doesn't that happen frequently today?

A. It has happened frequently since 1939.

Q. On such occasions they ask the business agent of the union or the other employee of the union to tell them all the names of individuals who are available to fill those corners, don't they?

A. It does happen that way, yes.

Q. The employees of the paper will state to the business agent or other employee of the union which individual they want?

A. If you submit a list of names, naturally, then, he selects the one that he wants.

Q. Now, prior to August 31, 1937—that is, prior to the first union contract, and after April 1, 1937, isn't it true that the publishers would dismiss vendors, first, for not paying sufficient attention to the sale of papers?

A. I wouldn't deny the statement.

Q. I beg your pardon?

A. I wouldn't deny the statement.

(Testimony of William Parrish.)

Q. And isn't it also true that they would dismiss them because they failed to show up on the corner at the appointed time properly?

A. I don't—there were vendors who lost their corners for a great many reasons.

Q. And what were some of those reasons?

A. Drunkenness. Some cases, I think perusal of our agreement will show you some of the things which we corrected.

Q. Just tell me what are some of those things? Lateness?

A. No, that isn't any of the questions that came up in that.

Q. Now about failure to stay on the corner?

Mr. Fink: Just a minute. Were you through with your answer? A. No.

Mr. Jacobs: Go ahead and finish it.

A. Not all of the representatives of the publishers—not all of the publishers, but some of them, and a great many of their representatives prior to the organization, considered themselves little tin Jesuses.

The Court: Well, now, Mr. Parrish, the question was very simple. He just wanted you to state what were the reasons or causes for the dismissal of the men who sold papers at the corners by the publishers in the period from April to August, 1937, if you know. If you don't know, you can't answer.

A. Failing to show up.

(Testimony of William Parrish.)

Q. You gave one cause, drunkenness.

A. Drunk; failing to show up at the corner; doesn't like your looks; wanted to put somebody else on the corner.

Q. (By Mr. Jacobs): Who doesn't like your looks? A. Well, the wholesaler.

Q. Failure to stay on the corner, I presume?

A. Imagine that would be one of the reasons.

Q. Now, at that time, that is, April 1, 1937, to August 31, 1937, the wholesaler was handling vendors with respect to that punishment, was he not?

A. That doesn't hold true for that full period of time.

Q. It was true part of the period, was it not?

A. Part of the period.

Q. And isn't it true also that men were transferred from one corner to another for the same reasons during the same period?

A. I don't know about the reasons for transfers, but there have been transfers executed from one corner to another since I have been in the sale of papers.

Q. Sometimes it is for cause, and sometimes it isn't? A. You are correct.

Q. Some of the causes have been those you just state? A. It could possibly be.

Q. Is it or isn't it?

A. I don't know of my own knowledge.

Q. You don't know of your own knowledge?

A. I can't recall any definite transfer of a vendor for any of the reasons which I stated.

(Testimony of William Parrish.)

Q. Do you recall whether a man has been told by a wholesaler that he isn't wanted any more and no reason is given at all? A. Yes.

Q. Do you also know that men have been transferred from one corner to another without any stated reason? [224]

A. I wouldn't answer that question, because I couldn't give you a direct—I couldn't give you a direct answer on the question.

Q. Do you know whether vendors have been laid off by wholesalers in this period for the causes you have stated? A. Yes.

Q. Now, subsequent to August 31, 1937, Mr. Parrish, did that practice change? A. Yes.

Q. And if so, when?

A. Oh, I would say, along about the organization time of the union it began changing.

Mr. Fink: That was May, 1937? A. Yes.

Mr. Jacobs: Do you want to examine him, Mr. Fink?

Mr. Fink: I wanted to identify the time for the record.

Mr. Jacobs: He has already testified to that.

Mr. Fink: Pardon me; I just wanted to get it again.

A. The change, Mr. Jacobs, became evident when the wholesalers themselves formed a union. They seemed to show a great deal more consideration for the vendors than they had in the past, possibly with the thought in mind that they would use them in the future.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): In what respects did the practice change after August 31, 1937?

A. After August 31?

Q. Yes.

A. From that date on the wholesaler had no control over the individual vendor. [225]

Q. Now, you stated on direct examination that from time to time the union would punish its members in one form or another, discipline its members in one form or another, for violations of the contract, is that right? A. That's right.

Q. And that would include the various causes that you stated a moment ago, would it not? Drunkenness, failure to report, not staying on the corner, not paying attention?

A. Well, I don't know about the not paying attention.

Q. We will exclude that. All the other reasons you stated? A. Yes.

Q. Isn't it also true, Mr. Parrish, that you learned of those violations of the contract from the employees of the publisher?

A. Not all the time.

Q. That was frequently the case, was it not?

A. It has been the case, yes.

Q. Do you know how that information was obtained by the employees of the publisher?

A. Well, the wholesaler reported to the street man, and the street man took the matter up as a matter of violation of the contract between the union and the publishers.

(Testimony of William Parrish.)

Q. And the union in turn would act upon the complaint submitted by the employees of the publisher, is that correct?

A. The business representatives would investigate it, yes.

Mr. Jacobs: May this be marked for identification, please? [226]

The Clerk: Defendant's M for identification.

Q. (By Mr. Jacobs): I show you Defendant's Exhibit M for Identification, and ask you if you recognize it?

A. Yes, it is a complaint form which was put in use at one time.

Q. By whom? A. By the union.

Q. At what time?

A. Oh, I believe it was around the end of 1939; it could possibly have been in the middle part of '39.

Q. Referring to Defendant's Exhibit M for Identification, I notice it is called "Complaint Form," and it says, "Name of vendor making complaint." And this complaint says the complaint was made by the office. By that I take it you mean the publisher?

A. No, it means that particular complaint was made by myself.

Q. You being the office in this case?

A. Yes.

Q. And refers to the name of the wholesaler with respect to that particular complaint?

A. Well, I don't know; I haven't read it.

(Testimony of William Parrish.)

Q. You notice it states here, Mr. Parrish, that the complaint was received by Mr. Parrish from the office.

A. I don't see what you mean.

Q. Right here, "Complaint received by W. B. Parrish; From whom, Office."

A. Well, I just filled in the word because I have used my name up at the top.

Q. Mr. Parrish, after this form was inaugurated by the union [227] was this sort of form used to record complaints received from the publishers?

A. No, that was not—no, we didn't use that for that. Those forms were printed or were procured in the first instance to keep a check of all of the violations on the part of the publishers in regards to the agreement.

Q. I see. You weren't interested in violations of the contract by the vendors?

Mr. Fink: Now, just a minute. Are you withdrawing that document that has been marked for identification?

Mr. Jacobs: I haven't offered it.

Mr. Fink: You had it marked for identification.

Mr. Jacobs: Yes, but that doesn't mean—

Mr. Fink: I would like to have it remain in the custody of the Clerk.

The Court: It remains in the record; otherwise we wouldn't know what document you were referring to in your question.

Mr. Jacobs: Sorry.

(Testimony of William Parrish.)

Q. Isn't it true that after August 31, 1937, that the publishers from time to time discontinued their contract with individual vendors because of the various reasons you have stated?

A. Yes—not all of the reasons stated.

Q. I beg your pardon?

A. Not all of the reasons.

Q. Not all of the reasons? A. No. [228]

Q. Would you give some of the reasons that they discontinued the contracts after August 31, 1937?

A. Drunkenness on the corner was a reason for discontinuance of the contract. Failing to show up at the corner without justifiable reason was reason for discontinuance.

Q. Drunkenness? A. Yes.

Q. Not remaining on the corner for the sales period?

A. Walking off the corner; failing to check in, would be a reason.

Q. Now, you stated on direct examination that you were charged for the newspapers by the wholesaler on a hundred copy basis. You mean you always received the papers in multiples of one hundred?

A. I took the question which I answered to mean that if you sold less than a hundred that you paid on the basis of \$3.00 per hundred, or a dollar and a half for fifty.

Q. Mr. Parrish, did I understand you correctly—and I want to clarify the record on that—in re-

(Testimony of William Parrish.)

ferring to the photographs marked as Exhibits 48-A to 48-H, and particularly to Exhibit 48-C, that there were approximately ten such magazine stands?

A. You are talking about the large stands?

Q. Yes.

A. Yes, I am fairly certain of that.

Q. You also stated on direct examination that approximately a hundred of the vendors sold publications other than newspapers, is that correct?

A. We were talking of the period 1937 to 1940?

Q. That is right. A. Yes.

Q. You also stated—I believe I am correct—that approximately fifty sold articles other than newspapers or publications, is that correct?

A. I beg your pardon?

Q. I think Mr. Fink asked you on direct examination how many people, how many news vendors, or the Court asked you how many news vendors sold articles other than magazines and papers or other publications. A. No.

Q. You haven't testified on that point at all?

A. I am certain in my mind that that question wasn't asked.

Mr. Fink: I think the witness is confused as to the form of your question, Mr. Jacobs, only. I don't want to interrupt your examination.

Mr. Jacobs: I would like to get the matter straightened out. Do you remember the question?

Mr. Fink: Yes, I referred to the sale of razor blades and things of that sort. That may refresh the witness' recollection.

(Testimony of William Parrish.)

Q. (By Mr. Jacobs): Do you recall——

The Court: He did say, I think, that the number was approximately fifty. He said that they sold other knick-knacks and articles like razor blades in addition to selling papers.

Mr. Fink: Candy bars and things of that sort.

The Witness: I think I used the expression that there were some who did. I don't believe I used a figure. The word—the number, your Honor, was in the direct question.

Q. (By Mr. Jacobs): Can you state with any reasonable degree of certainty how many such people there were?

A. That would be difficult to do now.

Q. Well, the figure of a hundred you gave, are you confident with any degree of certainty of that figure?

A. A hundred sold publications and so forth?

Q. Yes.

A. That is a low figure for it, Mr. Jacobs.

Q. What do you base your estimate on? Just your recollection?

A. During the period of time, Mr. Jacobs, there was at least thirty-five news stands, or, I will say in 1937 there were at least thirty-five news stands, and then a great many corners that handled just racing forms.

Q. Now, Mr. Parrish, I notice reference in the contracts to call-backs. Will you explain what a call-back is?

(Testimony of William Parrish.)

A. Yes. The explosion at this naval depot across the bay here some year and a half or two years ago was a great selling story. It happens at such times that the publishers wishes to put out additional vendors after they have completed their sales period. Under the contract he has the right to request the vendor to accept a call back. If he accepts it, O.K.; if he doesn't, that is O.K. too. [231]

Q. In the period 1937 to 1940, how did he communicate with the vendor?

A. Well, the wholesaler, the publisher—I imagine the street man says to his wholesalers, “See how many of the fellows will answer a call-back, for in the morning there is a big story breaking.”

Q. Isn't it true, Mr. Parrish, that frequently—or there have been occasions, rather—when the wholesaler would request the vendor to remain on the corner after the end of the selling period, which additional period would be treated as a call-back under the contract?

A. That has happened, yes.

Q. Now, there is also reference in the contract to special events corners. There is reference to special events corners in the contract, which I understood to mean any public gatherings or any special event?

A. Fights, wrestling matches, football games.

Q. Race track?

A. No, we have nothing to do with the race track. This Good Friday, the gathering that is

(Testimony of William Parrish.)

usually around the church over there, that is sort of a special event. [232]

(After recess.)

Q. And does the wholesaler communicate with the vendors to obtain vendors for such special events?

A. They are obtained through the office of the union.

Q. You also spoke on direct examination of certain placards that you referred to as, I think, rack cards.

A. That is right.

Q. Who places them on the corners?

A. The wholesalers.

Q. He places them on racks which are placed there by the wholesaler, are they not?

A. Somebody put the racks there, Mr. Jacobs.

Q. Those racks are the property of the newspaper, are they not? And are they not on the corners throughout the day and night?

A. That is right.

Q. And, of course, the rack bears the name of the newspaper, does it not?

A. Some have been there so long they don't bear any name.

Q. Some are pretty weather-beaten.

A. That is right.

Q. The placard contains the name of the paper, and some feature of the paper, does it not?

A. That is right.

(Testimony of William Parrish.)

Q. Now what is meant by boot-jacking?

A. Boot-jacking is a lost art, but if you ever woke up in the morning about 1:00 o'clock and heard a guy hollering under your window "Extra", that was a boot-jack.

Q. Was boot-jacking carried on in the outer districts of the [Balance missing in copy] [233]

A. I can't recall boot-jacks being used for the last four or five years.

Q. In the period 1937 to 1940 it was used, was it?

A. There were some occasions that the publishers did ask us for boot-jacks. If we had them, we supplied them.

Q. Was boot-jacking carried on in the outer districts of the city?

A. That again, Mr. Jacobs has to do with the type of story you have.

Q. Was it or was it not?

A. Sold in the outer districts, sold downtown here.

Q. On occasions when they were sold in the outer districts, after the vendors were obtained, the boot-jacks, isn't it true the publishers would, on occasion transport the vendors to the area in which the boot-jacking was to be done?

A. I don't recall any instance of that.

Q. And, by the way, papers are delivered to you on the corner by vehicles owned by the publisher, are they not? Papers are delivered to you on the corner in a vehicle owned by the publisher?

A. Talking about the period 1937 to 1940?

(Testimony of William Parrish.)

Q. Yes.

A. During that time the wholesalers owned their own machines. I don't believe the publishers had begun using trucks of their own yet.

Q. Now, Mr. Parrish, are you a member of any other organization besides the union?

A. No.

Q. Mr. Fink asked you, I believe, whether the paper bore any [234] of your expenses.

Mr. Jacobs: Did I understand the question correctly?

Mr. Fink: Substantially.

Q. (By Mr. Jacobs): What expenses do you have, Mr. Parrish, in the sale of newspapers?

A. None that I know of, just except the loss through credit or the wind blowing a paper away which I don't recover and turn in.

Q. Through what medium?

Mr. Fink: The wind blowing the paper away which he does not recover and turn in.

Q. (By Mr. Jacobs): That is the only expense you have. Is that right? A. Yes, sir.

Q. Have you any current expenses at all?

A. No, carfare getting to and from the corner.

Q. Do you keep books and records?

A. No.

Q. Do you advertise in the papers at all?

A. No.

Q. Have you any business fund?

A. No, sir.

(Testimony of William Parrish.)

Q. Have you invested any capital to sell newspapers?

A. Well, I have to be sure that I will have enough money to pay for the papers.

Q. Mr. Parrish, in the period approximately August 31, 1937, were most of the San Francisco newspapers being sold, I say, were most of the San Francisco newspapers being sold in most [235] instances on a basis of exclusive representative?

A. August 31, 1937?

Mr. Fink: After or before, I did not get it.

Mr. Jacobs: On.

A. On August 31, you say?

Q. Yes. A. Were the majority?

Q. No. Were the newspapers, the San Francisco newspapers, The Examiner, The Call-Bulletin, and The Chronicle being sold on the basis of exclusive representation?

A. Not all of them.

Q. That was by far the large majority of the case, was it not?

A. The Call and News were sold on an exclusive representation; The Examiner and Chronicle, with the exception of about, I would say 15 corners, I would not go higher than that, it might possibly be higher, but I don't believe so, were joint representation, all except about 15 corners.

Q. With respect to The Chronicle and The Examiner, can you tell me approximately when it became prevalent for those two papers to be sold on a basis of joint representation?

(Testimony of William Parrish.)

A. It started some time in the month of May.

Q. 1937? A. Yes.

Q. Is it not true, Mr. Parrish, that since April 1939 to 1940 there has been a scarcity of news vendors?

A. Since 1940 there has been a scarcity did you say?

Q. Yes.

A. Yes, during the war years, naturally. [236]

Mr. Jacobs: May this be marked for identification.

(The document referred to was marked Defendant's Exhibit N for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit N for identification, and ask you if that is your signature appearing on the back of it?

A. Yes, I would say it was my signature.

Mr. Jacobs: Thank you.

Q. Mr. Parrish, you did sell The San Francisco Examiner and The Chronicle for some time during 1940? A. Yes.

Q. You were a member of the union at that time? A. Yes.

Mr. Jacobs: No further questions.

Mr. Ladar: I would like to ask the witness a few questions if I may.

The Court: Yes.

(Testimony of William Parrish.)

Redirect Examination

By Mr. Ladar:

Q. Mr. Parrish, calling your attention to this——

Mr. Jacobs: Is it understood that this amicus curiae is going to examine from time to time?

The Court: Have you any objection?

Mr. Jacobs: I just want to know.

The Court: If Mr. Linn wants to ask any we will extend him the same courtesy.

Mr. Linn: I think you are running an awful risk.

Q. (By Mr. Ladar): Calling your attention to Defendant's [237] Exhibit J in evidence, Mr. Parrish, that part of it in particular that is on page 6. Have you got a copy of this? A. Yes, I have.

Q. Just see if you see where I am picking it up:

“There had been quite a number of meetings and the ideas of both parties have been laid on the table.”

Mr. Ladar: For the information of the Court, this is the report of the committee admitted in evidence.

“There had been quite a number of meetings and the ideas of both parties had been laid on the table. That is the most important step in any negotiation. The most important of these steps that we have taken is the matter of relationship which is on the basis of buyer and seller instead of employee and employer.”

(Testimony of William Parrish.)

Then, there follows this sentence:

“We agreed to this because we felt that it did not make any difference what they called us, so long as we got what we wanted in the way of wages, hours and working conditions.”

Q. Mr. Parrish, did the members of the negotiating committee meet and work out the language of that report? A. Yes.

Q. In those meetings, you attended those meetings? A. Yes.

Q. In those meetings, was that language selected for any particular purpose?

Mr. Jacobs: It is immaterial and irrelevant why it was [238] selected, your Honor. The fact was it was selected.

Mr. Ladar: May it please the Court, at the time this was introduced in evidence Counsel made the point that he was going to show the intention by this document. That is precisely what I am trying to bring out.

Mr. Jacobs: Doesn't the document speak for itself?

Mr. Ladar: Not necessarily, if the Court please. A document like this should be explained in the light of its purpose and the circumstances surrounding its execution, particularly if it is put up for the purpose of showing the intention in a contract. It is the report of a negotiating committee.

The Court: What is the question again?

(Question read by the Reporter.)

(Testimony of William Parrish.)

The Court: Well, I don't know how the witness' answer is going to help the Court any, but I am kind of curious to see how he would answer, so I will allow it.

A. Why, yes, for the simple reason that we could not begin negotiations until the question of relationship had been settled. Second, that we had been informed under the laws we were not employees, and we felt that matter really was not of any importance even if we could force the publishers to agree to an agreement that we were employees by a strike action or something, the law itself would determine we were not.

Q. (By Mr. Ladar): Well, Mr. Parrish, what I was trying to bring out in this preliminary is, what were you going to do with this [239] report after you made it up? A. This report?

Q. Yes.

A. We were asking for a strike vote from the men.

Q. Would you take it into the meeting and read it? A. Yes, this is the complete report.

Q. I understand that. I just asked would you take it into the meeting and read it? A. Yes.

Q. In writing up the language of this report were you endeavoring to convey to the union the idea that there had been progress in the negotiations?

A. Yes, and also the fact that we had reached a stone wall. We had to have something to use as a club.

(Testimony of William Parrish.)

Q. Now, prior to the time that you agreed, as stated in here, that there would be a buyer and seller instead of an employer and employee relationship, had you taken the advice of anyone on the buyer and seller relationship?

A. Yes, we had.

Q. Whom did you take advice from?

A. Mr. Kagel of the National Labor Bureau, and John Shelley, president of the San Francisco Labor Council.

Q. After getting advice, without relating statements that anybody made, did the committee meet and express a final agreement to agree with the publishers on that? A. Yes, it did.

Q. Were you present when the committee members expressed their views? A. Yes.

Q. Are you in position to state, after getting that advice, [240] what the views of the various committee members were?

Mr. Jacobs: If it please the Court that is the view of the committee members in that report.

The Court: You object to that last question?

Mr. Jacobs: Yes.

The Court: I think it would be hearsay. I am not interested in what he says somebody else said.

Mr. Ladar: If your Honor please, the whole report is obviously hearsay. It is a report from a committee, one party to a contract, to its own members.

The Court: But the witness has vouched for it. He says that is the written report agreed upon, and that the union accepted.

(Testimony of William Parrish.)

Mr. Ladar: And that is correct. That is the reason I say it is hearsay because obviously, as to this particular plaintiff, obviously something *down* outside of his presence.

The Court: Do you want to ask another question?

Mr. Ladar: It is preliminary to this. I want to ask this final question, if your Honor please:

Q. What did that committee mean by the words, "We agreed to this because we felt that it did not make any difference what they called us, so long as we got what we wanted in the way of wages, hours and working conditions"?

Mr. Jacobs: An objection, your Honor.

The Court: I think it is objectionable, but I would like [241] to see how the witness would answer that. That is a rather clear statement. Did they mean anything else by it other than what was there?

A. We meant simply this, your Honor: On the advice that we had received, we were not employees, we were actually independent contractors.

The Court: That is not what the attorney asked you. That is not what the attorney asked you and it is not what I asked you. Did you mean anything else by the language Mr. Ladar read to you than what the language said? A. No.

The Court: That is what you meant.

A. It made no difference to us.

Mr. Ladar: I don't think you answered the Court's question, personally.

(Testimony of William Parrish.)

Q. Did you mean it made no difference? I will ask the question this way, if I may, your Honor: I call you attention to the words "It made no difference to us what they called us". What did you mean by "What they called us"?

Mr. Jacobs: The same objection.

A. Well, on the basis that we were not employees under the law, to us it made no difference whether we sat down and drew up a contract as independent contractors.

Q. (By Mr. Ladar): So, would you say that you, as one of the members of the committee, believed that what the publishers [242] called you made no difference because of the facts as they were, what they called you was not determinative? Is that what you mean?

Mr. Jacobs: Just a minute.

The Court: That is quite argumentative.

Mr. Ladar: I submit it is argumentative, if your Honor please, but the witness has stated this thing was drawn up for a particular purpose, to put over particular points with their union. He also stated they took advice prior to the time they wrote this up.

The Court: I know, but the last question was very argumentative. You are putting a construction on it that is very argumentative. I think this witness is an honest, straight forward witness. I think when he wrote in that report that it did not make any difference, that is exactly what he meant.

(Testimony of William Parrish.)

Q. Isn't that true? That statement is not a false statement, is it?

A. No, your Honor. We meant exactly that because the question was one which had been decided by the courts.

Mr. Ladar: That is the point. It was decided by the courts. He did not mean it was immaterial. He keeps saying that, but I don't think he says that now.

The Court: To be perfectly honest about it, it did not make any difference to you whether you were an independent contractor, an employee, or what your status was called. You were interested in your economic situation, how much money [243] you would get, how good you could make conditions for you and your associates. That is correct, isn't it?

A. In one sense of the word you are right.

Q. Is it incorrect in any sense?

A. At the time this was drawn up, your Honor, by virtue of the various court decisions we did not feel we were employees, so it made no difference.

Mr. Ladar: That is what I am trying to bring out. That is quite different than the implication sought to be made before, to wit, that it did not make any difference one way or the other, that they did not care how the thing worked out. I think these men took advice, as the witness said today. That is the real answer.

(Testimony of William Parrish.)

The Court: Nobody told you it was unlawful to be an employee of a newspaper publisher, did they?

A. Well, it was stated definitely to us that through court decisions that had been handed down adjudging that news vendors were not employees, that we were independent contractors.

Q. The attorneys did not tell you it was unlawful to be employees, that there was anything wrong in that, did they?

A. No, it was not an attorney, your Honor. It was Mr. Kagel.

Q. (By Mr. Ladar): The newspaper publishers had told you they would not enter into a contract with you on any other basis than independent contractors, had they? [244]

A. That is correct.

Q. Your committee believed that was your status at that time did they? A. That is right.

Mr. Jacobs: I move to strike the last answer. It is in direct conflict with the statement.

Mr. Ladar: I think the matter is one of ambiguity, your Honor.

The Court: I think this matter already has been gone into. It was heretofore stated by the witness, as well as Mr. Bitler, that it was at the request and suggestion of the newspaper publishers that there be an independent contractor relationship. The union acceded to that. That is all I see in the facts. If there is anything different, you gentlemen can correct me on that.

(Testimony of William Parrish.)

Mr. Ladar: I think when your Honor gets around to looking over the evidence, the reason I brought the point up is because I have had experience with reports of negotiating committees; as I stated before, it may be argumentative. It is intended to get over to the members the progress of the negotiations, and the statement in here "We felt that it did not make any difference what they called us" is misleading.

The Court: I think the witness fully stated that. I understood him. So far as the union was concerned it did not make any difference whether they had an independent contractor relationship or were employees. They were [245] principally interested in the economic situation of getting what they *they* thought was adequate compensation and reasonable working conditions. Now, they accepted this contract because they thereby got the condition they wanted. Isn't that right?

The Witness: Your Honor, I imagine in 1937 if we had been informed that under the law we were not employees but were independent contractors, that possibly there would have been a different ending to the negotiations.

Q. Well, if you had been given the same conditions in every other respect, both as to hours, wages or other conditions which are specified in this contract, and were still called "employees", would it have made a difference to you?

A. The difference would be in the language. Perhaps you don't quite get the thought. That is

(Testimony of William Parrish.)

simply this: We, the group first elected to sit down and negotiate with the publishers, did contemplate drawing a contract such as the one we have here today, something that we knew nothing whatsoever about the language, and so forth. That first month, I might say, the committee, including myself, looked at the stuff the publishers handed us, and by golly, you could not make heads or tails of it.

The Court: In order that the Court's examination may be made plainer, I am not deciding by this series of questions whether it is an independent contractor relationship or an [246] employee relationship. Counsel, by examination, opened the question of what the meaning of the language used by the union's committee was and its attitude toward the matter was.

Mr. Ladar: That is the point I wanted to bring out.

The Court: But I don't think that language is ambiguous at all. But, what that has to do with the ultimate question is a matter the Court cannot decide until all the evidence is in.

Mr. Ladar: Just one further question:

Q. Did any member of that committee ever state in your presence that the agreement you had made, that the committee had made, regarding the buyer and seller relationship, was one that would not be lived up to in good faith? A. No.

Q. It was never stated by any member of the committee that it would be taken for just what it was worth?

(Testimony of William Parrish.)

A. When the decision was made on the part of the union to accept a buyer and seller relationship, we accepted it with no strings attached.

The Court: Well, I am not intending to cut your examination off. If you have further questions to ask, go right ahead, but I think we better take the afternoon adjournment at this time.

Mr. Fink: Yes, I have got two or three questions. They will not be long. Your Honor, yesterday in discussing your usual court procedure, said something about your Monday [247] calendar. What time will we adjourn to on Monday?

The Court: I don't see how I could possibly take this case up before Tuesday, because I have a law and motion calendar in the morning, and it is my monthly assignment for naturalization and I have about 20 to 30 contested naturalization cases to hear, besides two criminal cases in the afternoon which they tell me are going to be short. I am afraid we will have to recess until Tuesday.

Mr. Fink: That is all right. I simply wanted to know the time.

If it please the Court, I want to announce once more that after Mr. Parrish is excused from the stand, I will present two more witnesses. Then I will tender to Counsel for the defendant a stipulation to the general effect, as announced yesterday, that additional witnesses from the San Francisco Call-Bulletin and The San Francisco Chronicle are available; that their testimony will be substantially the same in all respects, and there will be variations

(Testimony of William Parrish.)

only in minor details, not affecting the general question, and I will tender that stipulation. If it is accepted, we should be through, so far as the plaintiffs are concerned, on Tuesday.

The Court: Well, I guess we will have to meet that situation when it arises.

Mr. Fink: I simply made that statement for the benefit of Defendant's Counsel. It makes no difference to me.

(Adjourned to Tuesday, April 2, 1946,, 10:00 a.m.) [248]

Tuesday, April 2, 1946, 10:00 A.M.

Mr. Jacobs: If it please the Court, before Mr. Fink commences, he has several times stated that he would call witnesses from one paper and then proffer a stipulation that the representatives of the other papers will testify to the same effect. Without committing the Government in any way, I believe that we would be much more inclined to give favorable consideration to such a stipulation if employees of The Chronicle Publishing Company were called first. Do I make myself clear, Mr. Fink?

Mr. Fink: No, you do not.

Mr. Jacobs: Does the Court understand me?

The Court: Well, you mean it all depends upon the order of proof whether you take the stipulation?

(Testimony of William Parrish.)

Mr. Jacobs: As I understood Mr. Fink's statement, after Mr. Parrish's testimony is over, he will call representatives of The San Francisco Examiner. We would be more inclined to enter such a stipulation if employees of The Chronicle were called first, and then the stipulation proffered.

The Court: Suppose we leave that until we finish the testimony of this witness and see how we get along.

WILLIAM PARRISH

recalled.

The Court: Is this witness on the stand for further [249] cross-examination, or is that completed?

Mr. Fink: No. The cross is concluded, your Honor. He is on redirect examination.

Redirect Examination

By Mr. Fink:

Q. Mr. Parrish, in your testimony you have testified from your knowledge as a member of the union since its inception. Is that true?

A. That is true.

Q. I believe you have testified that you were twice president of the union.

A. Yes, sir.

Q. And business agent for the union?

A. Yes, sir.

Q. And you are now and have been for how long secretary and treasurer of the union?

A. Since October 16, 1943.

(Testimony of William Parrish.)

Q. In your various capacities have you had occasion to observe the general course of conduct by the vendors, and the general course of conduct of the vendors in their selling operations?

A. I have.

Q. In your business have you become familiar, and do you know the practices of the wholesalers in their dealings with the individual vendors?

A. I do.

Q. Mr. Parrish, from your experience can you state that the testimony which you have given as to the relationship, where you answered that you were testifying for yourself, can you say of your own knowledge that the relationship and methods and manner of selling is substantially the same in the case [250] of other vendors?

Mr. Jacobs: An objection, your Honor. On cross-examination this witness testified, when I asked a question about supervision, control and all that, he said it was hearsay so far as he is concerned, and your Honor ruled out his answer because it was hearsay. This answer depends in its very nature upon pure hearsay.

The Court: Well, technically, that might possibly be true, but the witness is an officer of this organization and is familiar with the manner in which the members of the organization have conducted the affairs of the organization, conducted their affairs under this contract. He has stated that. The objection, I think, would be in respect to the weight and credence to be attached to the

(Testimony of William Parrish.)

testimony rather than the admissibility. I will overrule the objection.

A. That is a correct statement.

Q. (By Mr. Fink): Mr. Parrish, on cross-examination you were interrogated about strike votes. Do you recall the testimony in that connection? I don't want you to repeat it. Do you recall the interrogation upon that subject? A. Yes.

Q. Mr. Parrish, did the union at any time since its inception take a strike vote on Section 1 of the contract, or any contract? A. No.

Q. Did the union since its inception at any time take a strike [251] vote on Section 1 in conjunction with any other issue? A. No.

Q. Mr. Parrish——

Mr. Fink: And, if your Honor please, this question may be out of order or it may not——

Q. What is a strike vote in union procedure?

A. A strike vote is preparation for the membership to strike. It is the first step.

The Court: I think the witness covered that, Mr. Fink. As I recall his testimony he stated a strike vote was a proceeding whereby the membership gave authority to the officials to call the strike. Is that right?

A. Yes, sir, and it is also to give the committee a club over whoever they are negotiating with.

Q. (By Mr. Fink): And those strike votes when they come arise upon specific issues?

A. Yes.

(Testimony of William Parrish.)

Mr. Fink: That is all. Oh, I beg your pardon.

Q. Mr. Parrish, you were interrogated concerning a sales slip, and a sales slip was handed to you. Do you recall that exhibit, without getting it? I have a duplicate of it here. A. Yes.

Mr. Fink: That is a duplicate of the one in evidence.

Mr. Jacobs: Yes.

Q. (By Mr. Fink): Mr. Parrish, this sales slip is a duplicate [252] of the one in evidence.

A. Yes.

Q. I hand you another document, do you recognize that document?

A. Yes, it is a Chronicle sales slip.

Q. And is that a sales slip that was used by The Chronicle?

A. Yes, it was used I know in 1937, 1938, 1939 and 1940, and as far as I know it is used today.

Q. And did it precede in point of time the use of the other one I have just identified?

A. I never saw that other sales slip until it was shown to me on the stand.

Q. This is the one with which you are familiar?

A. That is the only type I have ever seen.

Mr. Fink: I would like, if your Honor please, to offer in evidence a copy of the sales slip identified by the witness, and ask that it be given the next consecutive number.

Mr. Jacobs: No objection.

(The document referred to was admitted in evidence as Plaintiff's Exhibit 50.)

(Testimony of William Parrish.)

Mr. Fink: May I have the negotiating committee's report, Mr. Clerk. It is one of the last exhibits.

Q. Referring to Defendant's Exhibit J, Mr. Parrish, I note in reading the transcript that the date is identified as October 1, 1937. Is that a correct date?

A. No, it had been corrected. It was August 1st.

Q. August 1st, 1937?

A. Yes, August 1st. It is in the one back there.

Mr. Fink: That is all.

Recross-Examination

By Mr. Jacobs:

Q. Mr. Parrish, do you know Deputy Attorney General Clarence Linn seated at this table?

A. I don't know his name. I met the gentleman once before.

Q. That was in 1944, was it not?

A. 1944? I was under the impression it was in 1943. It could have been 1944.

Q. You recall that you went to his office in the State Building in company of Mr. Spooner, did you not?

A. I accompanied Mr. Spooner to his office, yes.

Q. And Mr. Spooner is the local representative of the International Printing & Pressmens Union?

A. That is right.

Q. He was at that time, was he not?

A. Yes, and still is.

(Testimony of William Parrish.)

Q. Do you recall the purpose of that visit?

Mr. Fink: Now, just a minute. I object to that as being incompetent, irrelevant and immaterial, having no bearing upon the issues here, and being in point of time four years, or three years, as the case may be, beyond any date we are concerned with.

The Court: What is the purpose of the question?

Mr. Jacobs: I propose to show through this witness that he, in company with another gentleman, visited the office of Deputy Attorney Linn, and that they then represented to Mr. Linn that it was desired to take an opposite position than the union is now here taking, and indicated, I believe, [254] to Mr. Linn at that time that they considered themselves employees. Now, your Honor has stated that the conduct of the parties after the contract was executed——

The Court: Of course, what new arrangement they might want to make would be immaterial. You are seeking it as an admission?

Mr. Jacobs: An admission of the then existing contracts which are in evidence, they wanted to take a legal position.

The Court: I will overrule the objection, if that is the purpose.

Mr. Jacobs: May I state for the record——

The Court: Just ask him a question. You may answer the question if you remember the question. He wants to know the purpose of the visit?

(Testimony of William Parrish.)

A. Mr. Spooner asked if I would go along with him. He received instructions from the International to contact the Attorney General to obtain some sort of information. As I had nothing else to do, I went along with him as the International representative.

Q. (By Mr. Jacobs). You don't know what the purpose of that visit was?

A. As I recall it, and it is still firmly in my mind, it was to obtain some information on the situation in Los Angeles.

Q. You have no recollection of what transpired at that conversation?

A. It concerned the Los Angeles situation [255] altogether.

Q. You don't know why you went with him?

A. I went because the International representative requested me to.

Q. You went to keep him company?

A. That is it, if you wish to put it that way.

Q. Mr. Parrish, based upon your experience as a news vendor, as secretary and treasurer of the Union, and as business agent for the Union, is it not the fact that prior to August 31, 1937, the wholesalers, in delivering papers to street vendors, directed and controlled those vendors?

Mr. Fink: Just a minute. I object to that upon the ground that it has already been covered in the cross-examination.

The Court: I think you have covered that ground.

(Testimony of William Parrish.)

Mr. Jacobs: As I indicated, I thought the question was ruled out as far as hearsay before.

Mr. Fink: No, the period from April 1 to August 31, 1937, was covered quite in detail on cross-examination.

The Court: But you went into that. My memory may be faulty about it, but you did ask him concerning that period. You are asking how the parties were handled in that period?

Mr. Jacobs: I have read the transcript——

The Court: You may ask the question again if there is any doubt whether it was covered. [256]

Q. (By Mr. Jacobs): Do you understand the question?

A. Whether or not the wholesalers directed and controlled the vendors selling papers on the streets prior to 1937?

Q. Prior to August 1st, 1937.

A. Prior to that, there is no doubt about it.

Mr. Jacobs: No further questions.

Mr. Fink: No further questions.

The Witness: Thank you, Judge.

(Witness excused.)

Mr. Fink: If Your Honor please, at this time I desire to offer in evidence and read into the record, Treasury Regulations Nos. 90 and 91. I make that offer at this time.

Mr. Jacobs: May it please the Court, if Mr. Fink wants to introduce it I won't interfere, but I don't think it is necessary.

The Court: You can call attention to any regulation in the statute. There is no requirement that it be in evidence, is there?

Mr. Fink: If your Honor please, this is not a statute. This is a regulation adopted by the Treasury Department.

Mr. Jacobs: I will stipulate that these regulations are subject to judicial notice, the Treasury regulations.

The Court: They may be taken into account by the Court in consideration of the case.

Mr. Fink: I would prefer, your Honor, respectfully [257] disagreeing with the Court, I prefer to have them in evidence for another purpose.

The Court: All right. Let them be marked in evidence.

Mr. Fink: I will supply a copy of them. I would like to call the Court's attention to a part of each of the regulations.

In Regulation No. 90, reading only the first two sentences:

“Generally the relationship exists”—and this speaks of employment:

“Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who provides the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is accomplished. That is, an employee is sub-

ject to the will and control of the employer not only as to what shall be done but how it shall be done."

Further in the regulation:

"In general if an individual is subject to control and direction of another merely as to the result to be accomplished by the work, not as to the means and methods of accomplishing the result, he is an independent contractor, not an employee."

In Regulation No. 91, I want to read just the first sentence to the Court and I will supply the copies:

"The relationship between the person for whom such services are performed and the individual who performs such services must, as to those services, be the legal relationship of employer and employee."

Then there is a similar sentence defining an independent contractor, which I have heretofore read.

Mr. Casaday, please.

The Clerk: Do you have a copy you want marked?

Mr. Fink: I am going to supply them. Will you reserve two numbers, please, one will be Regulation No. 90, the first one, and the other No. 91.

The Court: They will be No. 51 and 52.

Mr. Jacobs: Mr. Fink need not supply them to the Government.

J. D. CASADAY

called as a witness on behalf of the Plaintiffs;
sworn.

The Clerk: State your name to the Court.

A. J. D. Casaday, C-a-s-a-d-a-y.

Direct Examination

By Mr. Fink:

Q. Mr. Casaday, what is your occupation?

A. Circulation manager for The San Francisco Examiner.

Q. How long have you been such?

A. About almost 13 years.

Q. Last past? A. I beg your pardon?

Q. 13 years last past, the last 13 years? [259]

A. The last 13 years.

Q. Mr. Casaday, what is your experience in the newspaper business?

A. Well, I have been connected with various newspapers all over the country. I have been with the Rocky Mountain News of Denver, the Denver Post, the Indianapolis Star, the Buffalo Times, the Los Angeles Examiner and the San Francisco Examiner.

Q. Always in the circulation department?

A. No, not necessarily. I have been with the circulation departments on all of these papers, but in various other departments also.

Q. And that newspaper work has been the major part of the work during your lifetime?

A. That is correct.

(Testimony of J. D. Casaday.)

Q. Now, Mr. Casaday, were you one of the publishers' representatives in the negotiations on all five of the contracts with which we are concerned here? A. I was.

Q. And you appear as a signer of several of them, do you? A. That is correct.

Q. In referring to the 1937 contract, those negotiations, it has been established, opened some time in the month of June? A. They did.

Q. Now, do you know what time the question of the relationship of the parties arose?

A. I do.

Q. Will you state when.

Mr. Jacobs: Objection. Go ahead, I withdraw the objection. [260]

A. Immediately.

Q. (By Mr. Fink): And I assume when you say immediately, you mean at the first meeting?

A. Yes.

Q. Was there an agreement upon the matter of relationship?

Mr. Jacobs: I object, your Honor. That subject was not only fully covered, but it is fully covered by the agreement in evidence.

The Court: Of course, whether an agreement was reached is best evidenced by the agreement. Isn't that true, Mr. Fink?

Mr. Fink: Your Honor, I can only repeat what I have said. I have presented a witness from the Vendors Union. Now I am presenting one of the publishers' representatives. There seems to be, and

(Testimony of J. D. Casaday.)

I think it was repeated this morning, some indication at least that this is not a true agreement; that there is something wrong with it. Now, I am attempting to show there was a meeting of the minds. I am trying to be brief with it.

The Court: You have already made out a prima facie showing, haven't you, that the parties dealt at arms' length and that as a result of discussion entered into this contract?

Mr. Fink: If your Honor please, would the Court think I had made a prima facie showing with the testimony of only one of the parties to the contract? I have one of the other parties to the contract now. [261]

The Court: Well, the Court would not have any objection to your producing evidence any way you want to. That particular question I think probably was objectionable. Can't you ask some general question of this witness that will cover the matter?

Mr. Fink: I will withdraw the question, and start again.

Q. Mr. Casaday, there was, without stating what it was, there was a discussion at this initial meeting as to the relationship? A. There was.

Q. And did that question thereafter arise during the course of the negotiations?

A. That is not quite clear to me.

The Court: I think what Mr. Fink wants to know is, did you have discussions concerning whether the news vendors should be independent contractors or employees.

(Testimony of J. D. Casaday.)

A. After the initial settlement?

The Court: At any time from the first time you started negotiations.

A. From the time we first started, we discussed it, that we would not deal on any basis but independent contractor relationship.

The Court: At first the Union was opposed to that. Is that right?

A. Not necessarily so. At first, as I recall, the initial proposition, it proposed an employee relationship; we refused to negotiate on that basis at any time. [262]

Q. (By Mr. Fink): And did the Union negotiating committee accept that basis of negotiation?

A. They did.

Q. Now, in the year 1938 there opened negotiations which culminated in the contract dated 1939. Did that issue arise at that time?

A. It did not.

Q. And to the contracts of 1940, 1942 and 1944, did that issue arise? A. It did not.

Q. Mr. Casaday, are you familiar with the manner and means of delivery of newspapers to the vendors? A. I am.

Q. How are they so delivered?

A. By means of what we term "wholesalers".

Q. And those wholesalers are your employees?

A. They are.

Q. Approximately how many are there in San Francisco, it is not very important, on The Examiner? A. On The Examiner?

(Testimony of J. D. Casaday.)

Q. Yes. A. About 40.

Q. Have you issued any instructions to those wholesalers respecting their dealings with the vendors? A. I have.

Q. Were those instructions in writing?

A. They were not.

Q. How were the instructions communicated to the wholesalers?

A. Through their immediate superiors.

Q. And who would that be?

A. In our case?

Q. Yes.

A. Mr. B. J. Campbell on the night side, and Mr. Walter Schaefer on the morning side.

Q. Can you recite what those instructions were and are? [263]

Mr. Jacobs: May it please the Court, the instructions which are pertinent are the ones given to the vendors by their immediate superiors, not what instructions this witness may have given those superiors. That is the ground of the objection, that it is not material or relevant what instructions he gave to the immediate superiors of the vendors.

The Court: I will overrule the objection. The Court should hear the whole matter, I think.

Q. (By Mr. Fink): Have you got the question in mind?

A. I would appreciate it if you would restate the question.

(Question read by the Reporter.)

(Testimony of J. D. Casaday.)

A. My instructions to Mr. Campbell and Mr. Schaeffer, to be passed on to the wholesaler——

Mr. Jacobs: Mr. Casaday would you mind giving the date and point of time in this?

The Witness: I beg pardon?

Mr. Jacobs: Would you mind identifying this as to point of time?

The Court: I was about to say, does that cover the period 1937 to 1940?

A. Yes, sir. My instructions to these gentlemen was to pass along to the wholesalers to treat the vendors as independent contractors or merchants, and that they were to exercise no control over these news vendors.

Q. (By Mr. Fink): Did you give those instructions more than once? [264] A. Frequently.

Q. Do you know of your own knowledge whether or not those instructions were carried out by your subordinates?

A. May I answer that in my own way?

The Court: What do you mean by that? Was he present when the instructions were given? Is that what you are trying to bring out?

Mr. Fink: I will withdraw that question.

Q. Have you been present when those instructions were communicated to the wholesalers?

A. To the wholesalers?

Q. Yes. A. Yes, at various times.

Q. And you have heard those actual instructions given? A. To the wholesalers?

Q. Yes. A. Yes.

(Testimony of J. D. Casaday.)

Q. Have you any other employees of the San Francisco Examiner who contact the vendors other than the wholesalers? A. None.

Q. Then, so far as your department is concerned, is the news vendor free to offer his papers in any manner he sees fit? A. He is.

Q. Is the news vendor free to dispose of his papers as he sees fit?

Mr. Jacobs: An objection, your Honor. That is covered by your Honor's ruling on a previous witness' testimony, whether he is free to dispose of them as he sees fit. Your Honor, [265] I objected to that question when the same question was asked of the previous witness, on the ground that he was required to sell the newspapers under the terms of the contract.

The Court: I think that would call for a variation of the terms of the contract. We had that up before.

Mr. Fink: Yes, your Honor, we discussed it before. I recall that.

The Court: It is too general question to ask the witness for his conclusion.

Mr. Fink: Well, I thought I narrowed it. I don't want to argue it at length. I thought I narrowed it, showing that it is so far as his department is concerned. The point is, our position is there is a completed sale here.

The Court: Of course the contract really covers what you are asking the witness to give a conclusion about.

(Testimony of J. D. Casaday.)

Mr. Fink: Yes, Your Honor. May I elaborate a moment? A strict construction of the contract would indicate that the vendor would have to do one of two things, either he was to sell the papers or turn them in for credit. That is a contract provision. That is not what happens. What people do under a contract, how they themselves construe it, I believe is evidence.

The Court: Yes, that may well be, but I don't think the question, put the way you have put it, would cover that, because you are asking the witness to state a conclusion, [266] whether the man was free to do something or other. That, in turn, calls for an interpretation of the contract. You might ask him what actually happens.

Mr. Fink: I think your observation is accurate. I will withdraw the question.

Q. Do the news vendors dispose, to your knowledge, do the news vendors dispose of newspapers other than by way of sale or return for credit?

A. They do.

Q. And, of your own knowledge, can you state how they dispose of them, other than by sale or return for credit?

Mr. Jacobs: May the record show an objection to this whole line of testimony, as a variation of what is required under the contract? It is immaterial, the Government submits, whether they do those things in violation of the contract. The fact is, they are required in the contract to sell the papers.

(Testimony of J. D. Casaday.)

The Court: I will overrule the objection.

Mr. Fink: You may answer, under the ruling, Mr. Casaday.

A. May I have the question again?

(Question read by the Reporter.)

A. In some instances they dispose of papers from one vendor to another vendor.

Q. Anything else?

A. Naturally they buy papers themselves, particularly The Examiner.

Mr. Fink: He could not resist that plug, your Honor. [267]

Q. Do you maintain any payroll for the news vendors in your department?

A. I beg pardon?

Q. Do you maintain any payroll for the news vendors in your department?

A. We have no payrolls.

Q. Do you make any payments to the vendors, and confining the question to the period 1937 through 1940, do you make any payments to the news vendors other than as may be required under the guarantee provision of the contract?

A. We do not.

Q. Approximately how many vendors sell The San Francisco Examiner?

Mr. Jacobs: Can you give a date on that?

Mr. Fink: I will confine it to the period 1937 to 1940.

Q. Approximately how many vendors sold The San Francisco Examiner during that period?

A. Approximately 250.

(Testimony of J. D. Casaday.)

Q. I understand, Mr. Casaday, that The San Francisco Examiner operates with The San Francisco Chronicle what is known as a consolidated corner basis. Is that correct?

A. That is correct.

Q. And that is true of approximately all the corners in San Francisco?

A. You are speaking, are you, constantly speaking of 1937 to 1940?

Q. 1937 to 1940.

A. Mostly. There were at that time, as I recall it, approximately 12 or 15 what we term independent sales locations in the City.

Q. Out of the several hundred vendors?

A. Out of the [268] approximately 250.

Q. So far as the circulation department of The San Francisco Examiner is concerned, is the vendor free to circulate around the area of his corner?

Mr. Jacobs: An objection, your Honor. Again he is required under the terms of the contract——

Mr. Fink: I withdraw it voluntarily.

Q. Do you know of your own knowledge that vendors sell around the area of their own corners?

A. I do.

Q. Do they do that? Do they sell around the area of their own corners? A. They do.

Q. Have you in mind, Mr. Casaday, the number of vendors in the years 1937 to 1940 that made profits in excess of the guarantee?

A. You wish to know how many of the approximately 250 vendors made profits in excess of the guarantee?

(Testimony of J. D. Casaday.)

Q. That is right. Have you that figure?

A. During those years?

A. During the years 1937 to 1940. I would say approximately 220 to 225.

Q. Of the 250. Mr. Casaday, will you briefly, please, describe the operation of the guarantee provision of the contract? First, do you subdivide the operation of the guarantee provision of the contract between the papers? A. We do.

Q. And that is handled six months by The San Francisco Examiner and six months by The Chronicle?

A. You mean, each paper, each six months, reimburses the [269] vendors whose profits sold short of the guarantee?

Q. Yes. A. That is correct.

Q. And the papers, as between themselves, settle the balances, whatever they may be?

A. That is correct.

Q. Do you ever put vendors on a corner, or establish a corner that you know in advance will not make the guarantee? A. Have we done that?

Q. Yes, I say, did you, during this period 1937 to 1940 establish corners where you knew in advance the corner would not make the guarantee?

A. We do, or we did.

Q. And is there a circulation reason for that act? A. There is.

Q. Why do you establish corners when you know in advance you will have to make a payment under the guarantee provision of the contract?

A. A matter of service to the public.

(Testimony of J. D. Casaday.)

Q. And do you ever do it as a matter of competition? A. May I answer that?

The Court: He wants you to tell him.

A. Practically everything we do is a matter of competition.

Q. (By Mr. Fink): In other words, the newspaper business is one of the few competitive businesses? A. I think so.

Mr. Linn: I think that is calling for an economic interpretation.

The Court: I suppose that is true. I suppose the Court [270] won't close his eyes to the fact that San Francisco newspapers are in competition with each other.

Mr. Jacobs: I have no objection.

Q. (By Mr. Fink): Can you describe for the Court the manner of establishing corners in accordance with the provisions of the contract? How is that done, Mr. Casaday?

A. Well, corners, or sales locations have been established over a great many years. When these sales locations for any reason become vacant, it is a matter of common knowledge between the office and the News Vendors Union. The business manager of the News Vendors Union will call either the night or morning representative of the circulation department of The Examiner, stating that this sales location has become vacant, and offering at the same time a list of names of news vendors who might or might not be acceptable to the circulation department. Ultimately the business manager of

(Testimony of J. D. Casaday.)

the Union and the representative of the circulation department agree upon one of this list of members of the News Vendors Union who is available to cover this vacant sales location.

Q. And those vacant sales locations, or sales outlets, are checked how often, daily?

A. Might I ask what you mean by "checked"?

Q. Well, yes, I mean this, how often do you make a check to ascertain whether there are vacancies? [271]

A. There necessarily is not a check. When the wholesaler covers his district and the location is vacant, he will notify both the Union and the office.

Q. And from that you get the information to fill the vacancy? A. That is correct.

Q. Now, Mr. Casaday, does The San Francisco Examiner have a group-insurance plan, the group-insurance plan covering employees, life insurance?

A. Life insurance? They do.

Q. Are the news vendors included in that group, life insurance?

Mr. Jacobs: An objection, your Honor, to this whole line of questioning, whether they are treated as employees, in the life insurance plan, is incompetent and irrelevant, the Government submits, whether they treat them as employees or not, whether they are covered under the group insurance plan or not.

The Court: Why would it be?

Mr. Jacobs: May it please the Court, obviously the publishers are not going to recognize them as

(Testimony of J. D. Casaday.)

employees, cover them in a group insurance plan, if they had a contract that they were not employees.

The Court: What is wrong with that?

Mr. Jacobs: It is a self-serving statement. It does not prove anything.

The Court: I mean, I can contract any way I want to, may I not? [272]

Mr. Jacobs: The question is whether they were covered in a group insurance plan of employees.

The Court: Well, I must confess I don't see why that would be immaterial. The Court should hear all the evidence to show what the actual status of the news vendors is, in order to determine whether or not the statute is applicable.

Mr. Jacobs: Yes, your Honor. The ultimate question—I am not trying to exclude evidence from the Court—would be whether they are or are not insured under the group insurance plan of the publishers, does not prove or disprove, or add to or disprove to that question.

The Court: I will overrule the objection.

Mr. Fink: Have you the question in mind?

A. I think so, but I would appreciate hearing it again.

(Question read by the Reporter.)

A. They are not.

Q. Does The San Francisco Examiner, so far as you know, pay Social Security taxes on these vendors? A. They do not, not that I know.

Mr. Jacobs: Of course, if it please the Court, that is the issue before this Court.

(Testimony of J. D. Casaday.)

The Court: Whether they should pay, yes.

Mr. Jacobs: He cannot answer whether they should or not.

The Court: This was a tax paid under protest, was it not?

Mr. Fink: Yes, your Honor, paid under protest and a [273] claim for refund at the same time.

Q. Does your San Francisco Examiner pay under the Federal Unemployment Tax Act, or under the State system on these vendors?

A. They do not.

Q. Does The San Francisco Examiner have a vacation plan for employees? A. They have.

Q. Are vendors given a vacation with pay?

Mr. Jacobs: May the record show an objection to this whole line of testimony, as to how the vendors are compared in treatment with other employees.

The Court: Well, you may note the objection. It is very difficult to rule on an objection to a line of examination. If you are objecting to this question, I will overrule it.

A. They are not.

Q. (By Mr. Fink): Do you furnish vendors with transportation? A. We do not.

Q. Do you furnish them with any money which might be called an expense account or something of that sort? A. We certainly do not.

Q. Is the vendor free at all times to sell non-competitive articles?

Mr. Jacobs: Objected to as calling for a conclusion.

(Testimony of J. D. Casaday.)

The Court: Yes, the contract provides that can be done, as I recall it.

Q. (By Mr. Fink): Well, do the vendors in San Francisco sell [274] non-competitive articles?

Mr. Jacobs: An objection, on the ground of materiality, if your Honor please. Whether they do or not is immaterial, the Government submits.

The Court: I will overrule the objection.

A. They do.

Q. (By Mr. Fink): Do the vendors in San Francisco, to your knowledge, engage in activities—I will withdraw the question.

Q. Do the vendors engage in employment after they have finished their contract obligation?

The Court: I don't see the materiality of that.

Mr. Fink: All right, your Honor, I will withdraw it.

The Court: That would be true in any case. A man during a period that he is not bound to perform under another agreement, can do something else.

Mr. Fink: If your Honor please, I agree heartily, but may the record show that I am framing my question now on a State Government form. The State Government thinks it important. I agree with the Court heartily. I don't think it amounts to anything, but the Great State of California thinks it does.

Q. Mr. Casaday, is the vendor required to attend any meetings by The Examiner?

A. We do not have any meetings.

(Testimony of J. D. Casaday.)

Q. Therefore he is not required to attend any.

A. He is not required to attend any meetings.

Mr. Jacobs: Which they do not have.

Q. (By Mr. Fink): Do you exercise any control, or have any way of exercising control over the manner of the sale of the newspapers?

Mr. Jacobs: An objection, whether it is exercised.

The Court: I think you have covered that factually, Mr. Fink.

Q. (By Mr. Fink): Do you have anything to do with the matter of the vendors' collections from his customers? A. We have not.

Q. Have you any knowledge in your department of any credit relationship the vendor may have with his customers?

A. We have no knowledge of any such arrangements.

Q. Mr. Casaday, do you from time to time get from the public or other sources complaints against individual vendors? A. Occasionally.

Q. What do you mean by occasionally? How frequently? Just an approximation, how many would you have, say, in a period of a year?

A. Three or four.

Q. How are they handled when they come to you? A. They are referred to the Union.

Q. Did you do anything about it, as regards the individual vendor?

A. Our Mr. Campbell and Mr. Schaeffer discuss it with the business manager of the Union, and it is usually adjusted satisfactorily to everyone. [276]

(Testimony of J. D. Casaday.)

Q. Do you discharge the vendor?

A. We do not.

Q. Mr. Casaday, do you know of your own knowledge whether the vendors employ, themselves, employ substitutes?

Mr. Jacobs: An objection, on the ground of materiality and relevancy. The same question was asked the previous witness and ruled on. Whether they engage other employees, or not, is immaterial and irrelevant. Your Honor also ruled on the same question asked a previous witness.

The Court: I cannot say that I recall that.

Mr. Jacobs: The same question was asked of Mr. Parrish, if I recall correctly, and the same objection made, and the objection was sustained. I cannot refer to it at a moment's notice, but the same question was asked.

The Court: I don't see that it has any importance one way or the other. So far as this witness, I suppose it can be safely said that The Examiner or The Chronicle don't care particularly who sells papers, as long as they are sold.

Mr. Fink: If your Honor please, the question is directed to another point. The point involved is this: we wish to show that the vendor independently of anything the publisher knows, employs upon his own basis, makes his own arrangement, and from time to time employs other people. Now, we don't know anything about that.

The Court: Is there anything in the contract that prohibits that? [277]

(Testimony of J. D. Casaday.)

Mr. Fink: No, Your Honor, not a thing in the contract that prohibits that.

The Court: Is that right?

Mr. Jacobs: There is not anything in the contract that authorizes it.

The Court: The contract is silent. Is that right?

Mr. Jacobs: May it please the Court, I would not go so far as to say it is silent. This individual is engaged to sell the papers. Your Honor has the form of contract, John Jones engaged to sell papers under the terms of the Union contract, not to set up in business.

The Court: Well, if the contract does not prohibit it, I think I will allow the question.

Mr. Jacobs: If it please the Court, we want the record clear on that. We say the contract does prohibit it, in that the contract is for the vendor to sell the newspapers, the vendor individually.

The Court: Well, under your opponent's construction, he could still be an independent contractor and sell those papers. If he were an independent contractor, then there would be liberty of action to have someone else do part of his work, according to their contention. I think the evidence should go in for what it is worth. Didn't Mr. Parrish testify to that?

Mr. Fink: No, your Honor. This particular evidence has [278] gone in.

The Court: I will let it go in. Let the witness testify.

A. May I have the question?

(Testimony of J. D. Casaday.)

The Court: He wants to know if you know of your own knowledge that the news vendors have other men help them out selling papers.

A. Yes, to my knowledge, it used to be the practice for the vendors to have someone relieve them while they went to eat, or for other reasons that they might want to leave their sales locations temporarily.

Q. (By Mr. Fink): And they do from time to time leave their sales locations and put somebody else on the location? A. That is correct.

Q. And do you have any report in your office as to that activity?

A. We are not interested in it.

The Court: You get no report.

A. We get no report.

Q. (By Mr. Fink): Do you know who the substitute is who may be engaged by the individual vendor? A. We do not.

Q. Mr. Casaday, I hand you a mimeographed form, two mimeographed forms, one labeled at the upper left-hand corner "A. M." and then "P. M." Are those forms used by The San Francisco Examiner? A. They are.

Q. Mr. Casaday, we are interested, if you please, what is the distinction between the forms, the one labeled "A. M." and the one labeled "P. M."?

A. I did not get the question. [279]

Q. Why is one form labeled "A.M." and one form labeled "P.M."?

A. Because on our paper there is a distinction between the night side and the morning side for

(Testimony of J. D. Casaday.)

selling papers. The P.M. means sales that are the first edition up to around midnight. On the night side. The morning, A.M., is the sale of the final edition.

Mr. Fink: I seem to be having some trouble with these forms.

The Court: Before you get this straightened out, probably it is an appropriate time for the morning recess.

Mr. Fink: Thank you, your Honor. I am glad of the opportunity.

(Recess.)

Q. (By Mr. Fink): Mr. Casaday, to the two sheets which I handed you just before the recess, I have added a number of other sheets. What are those forms, please?

A. These are forms we used at one time to keep a tally of the sales records on the various locations in San Francisco.

Q. And that form is made up in your office?

A. It is.

Q. And what is the foundation in which the matter is transposed on to this form? Where do you get the information that goes on this form?

A. We required at times for the wholesalers to give us that information.

Mr. Fink: If your Honor please, I ask that this group of forms be introduced in evidence and be given an exhibit [280] number.

(Testimony of J. D. Casaday.)

Mr. Jacobs: No objection.

(The documents referred to were received in evidence as Plaintiff's Exhibit No. 53.)

Q. (By Mr. Fink): Now, Mr. Casaday, on this group of forms Exhibit No. 53 I note in the left-hand corner, or on the left-hand side of the page, there are designations by streets. What are those designations?

A. Those are designations of sales locations or corner where we sell The Examiner.

Q. Yes. And is that the method that you used in keeping track of the sales on the streets by the vendors?

A. Well, not necessarily. We use this in keeping track of our own records. We do not have a lot of the names of news vendors.

Mr. Jacobs: If your Honor please, the witness is going into a lot of things not responsive to the question, and I move that it be stricken. He was asked if that was the method by which they kept records. The answer obviously is no.

The Court: What is this sheet?

Q. (By Mr. Fink): Well, let's respond to the Court's question. What is the sheet, those sheets?

A. These sheets are a chart and listed on these sheets are the sales locations or corners in San Francisco, for the [281] purpose of telling us how many papers we sell at each location.

The Court: You keep a record on the sheet of how many you sell at each location?

(Testimony of J. D. Casaday.)

A. At times, not always. Whenever we want the information we keep it.

Q. (By Mr. Fink): And, Mr. Casaday, that form is written upon the basis of corners, rather than names of vendors? A. That is correct.

Q. Are any reports made to you by the vendors?

A. I lost that question.

Q. Are any reports made to you by the vendors?

A. No reports by the vendors.

Q. Does the vendor report in person to the circulation department of The Examiner?

A. They do not. Your Honor, may I qualify that?

The Court: The witness wants to qualify the answer.

Q. (By Mr. Fink): Go ahead.

A. In several instances there are news vendors that come to the alley to get their papers if they are situated right on the adjoining corner.

Q. But that is done by them for their own convenience? A. That is right.

Q. You would deliver the papers by your ordinary distribution system? A. We would.

Q. Mr. Casaday, in answer to a question of mine as regards [282] the 1938-1939 negotiations, I think you said that the question of the relationship did not arise. Do you recall how that negotiation started?

A. Well, I do not recall that that particular negotiation was any different than any other negotiation. The usual procedure is for the Union to

(Testimony of J. D. Casaday.)

submit us a proposal, and we, in turn, send them a counter-proposal, our counter-proposal in effect always has been the previous contract.

Q. And, in 1938 did you see any opening proposal of the Union? A. I did not.

Mr. Fink: You may cross-examine.

Cross-Examination

By Mr. Jacobs:

Q. Mr. Casaday, you stated 'that of your own knowledge you know that the vendors dispose of newspapers other than by selling them or returning them to the publisher. What is your source of information?

A. The source of the information I have in regard to the reply I gave to that question is reports that I get from my assistants.

Q. Then you don't know of your own knowledge, do you, Mr. Casaday?

A. Only to the extent of how far I rely on my operations.

Q. You have never seen a news vendor dispose of papers, have you, other than by selling or returning them? A. Personally? [283]

Q. Yes. A. No, I have not.

Q. You also stated, Mr. Casaday, that you know of your own knowledge that news vendors engage other persons to act as substitutes for them. What is the source of that information?

A. At times I have personally wandered around the streets of San Francisco, and I do know, I have known certain news vendors and their loca-

(Testimony of J. D. Casaday.)

tions, and even the nights they were supposed to be selling papers, and in passing these locations I have seen strangers selling the papers.

Q. How do you know, Mr. Casaday, whether the individuals you saw on the corners were not people who were engaged through the normal procedure, through the Union, for that night?

A. Because I have discussed it with the vendors.

Q. Then occasionally the news vendor has contacted somebody in the circulation department other than the wholesalers.

A. Not necessarily.

Q. I did not say whether it was necessary or not. Occasionally he does have those contacts with the head of the circulation department.

A. No.

Q. When you say you talked with news vendors on the corners——

A. Well, but that is not a business contact.

Q. What were you discussing, social life?

A. Yes.

Mr. Fink: I object to that as frivolous, and argumentative.

Mr. Jacobs: No, I mean the question seriously. He said it was not a business contact. [284]

The Court: Well, you are contending that this whole arrangement was a business contact?

Mr. Jacobs: No, but the witness stated on direct examination there was no contact other than with wholesalers, by the vendors. This witness now says he, himself, made contact.

(Testimony of J. D. Casaday.)

The Court: I think that is not much of a point, Counsel. The witness was merely responding to your inquiry as to how he happened to know that. He said he went around. It does not sound to me unreasonable that he would go around and talk to some of the news vendors and talk with some of the news vendors.

Mr. Jacobs: On the contrary, it would be very reasonable. I quite agree with your Honor. But it is quite unreasonable to say that nobody contacted the vendors other than the wholesalers.

Mr. Fink: Well, that is the fact.

The Court: I don't see what the question of contact has to do with it. Any business relationship, whether independent contractor, employment, anything else, bears a contact between the parties. That is not any point at issue. It is, What is the status?

Mr. Jacobs: May it please the Court, I did not raise this particular issue. Mr. Fink asked this witness; he made a point of it, whether anybody in the circulation department [285] contacted them.

The Court: Go ahead and answer the question. Is there still a question unanswered?

Mr. Jacobs: I will withdraw the question.

Q. Mr. Casaday, is it a fair statement to say that the function of circulation manager of your paper, your job, is to sell or to have as many San Francisco Examiners sold as possible?

A. Well, that usually is the function of a circulation manager.

(Testimony of J. D. Casaday.)

Q. Yes, that is quite obvious. That is your responsibility, is that right?

A. That is my responsibility.

Q. Now, who are your immediate subordinates in the circulation department?

A. You want me to name them all?

Q. Not necessarily by name, but by position. You have an assistant circulation manager?

A. Yes, we have an assistant circulation manager, a night circulation manager, a home delivery circulation manager, a news stand circulation manager, a suburban circulation manager, a country circulation manager, and an east-bay circulation manager.

Q. Do you have a street circulation manager?

A. No, we do not.

Q. Who in your circulation department is responsible for the delivery of papers to the vendors?

A. The wholesalers.

Q. And who are those responsible to?

A. I have already answered that question. Do you want me to answer it again? [286]

Q. You gave their names. I don't believe you gave their position or functions.

A. On the night side, the night circulation manager; on the morning side, it is the city circulation manager.

Q. The wholesalers are responsible directly to the night circulation manager and the day circulation manager?

A. And the city circulation manager.

(Testimony of J. D. Casaday.)

Q. With no intermediate superiors, is that right?

A. Several supervisors.

Q. What is the function of those supervisors?

A. They check out the papers to the wholesalers.

Q. Do they supervise the work of the wholesalers?

A. Not necessarily. It is more of a check-in and check-out job.

Q. How many supervisors are employed on the day side and the night side?

A. Would you mind qualifying that question to whether it refers to news vendors or the whole operation?

Q. I mean, to the news vendors.

A. We have one on the night side and one on the morning side.

Q. Now, is the supervisor's duty confined solely to the premises of the San Francisco Examiner?

A. In our case they are.

Q. He never goes outside the premises?

A. When you say "never," Mr. Jacobs, that would confine all of his work to the particular issue on hand, and that is not true. [287]

Q. I want to know what occasion there is for him to go outside, if there is an occasion.

A. Well, he might take a bundle over to the Greyhound Bus Station, when a bundle has been missed; he might go on an errand for me.

Q. Now, Mr. Casaday, the distribution of the street vendors' newspapers, to the street vendors, is divided into districts, is it not?

A. That is correct.

(Testimony of J. D. Casaday.)

Q. In the years 1937 to 1940, how many districts did you have?

A. I could not recall exactly.

Q. Can you recall approximately?

A. The operation changes completely.

Q. Would you say more than 50, or more than 15?

A. Between 1937 and 1940?

Q. Yes.

A. Oh, I would say about somewhere between 10 and 20 at that time.

Q. Between 10 and 20 districts. And to each one of these is assigned a wholesaler. Is that correct?

A. That is correct.

Q. Is there one wholesaler to each district on the day side, and one on the night side?

A. At times they overlap.

Q. But, normally, there is one wholesaler for each district on the day side, and one wholesaler for each district on the night side?

A. Normally.

Q. Mr. Casaday, occasionally during the years 1937 to 1940 The San Francisco Examiner employed new wholesalers. Is that [288] true?

A. 1937 to 1940?

Q. Yes.

A. Yes, occasionally we have employed new wholesalers ever since I have been there.

Q. Now, who instructs the new wholesaler upon his duties?

A. Well, the wholesalers are furnished by a drivers' union and they are supposed to be experi-

(Testimony of J. D. Casaday.)

enced and competent men, and they possibly get little instruction. The only instructions that are necessary to the operations we have, as I have mentioned a little while ago, are in regard to the relationship of the news vendors, the time of checking in and out, things of that kind.

Q. I ask you again, who instructs the wholesaler? A. Their immediate superior.

Q. The supervisor, is that correct?

A. No, the supervisors do not.

Q. You mean the night circulation manager?

A. The night circulation manager on the night side, and the city circulation manager on the morning side.

Q. The first time the wholesaler makes his delivery, the new wholesaler, is it not customary for an employee familiar with the district to take him around or drive around the district with him?

A. Not always. As I told you before, Mr. Jacobs, they are supposed to be competent and know the city, and they work from a route list.

Q. Have they always been competent? [289]

Mr. Fink: Oh, I object to that as incompetent and irrelevant.

The Court: Is there any importance to this?

Mr. Jacobs: I am trying to go into the relationship of the supervisors to the vendors and bring out that they must receive some instructions. The witness has evaded it so far.

Mr. Fink: I object to that statement, and it is not true.

(Testimony of J. D. Casaday.)

The Court: Well, I will ask you a question:

Q. What instructions do you ordinarily give to a man, a new man, who comes on as a wholesaler? What procedure does he go through?

A. Well, your Honor, may I say that the instruction would be according to how we felt, or the night circulation manager or the morning circulation manager felt as to his competency.

Q. If a man came along that the circulation manager knew had been doing that work before, he would not spend much time?

A. No instructions; give him a route list.

Q. Suppose the applicant was a newcomer, would there be anything particular the circulation manager would tell him?

A. In assigning a district to him he would give him the route list, ask if he was familiar with the district, if he could find his way around. He would explain the relationship with the news vendors, the method of collecting for the papers, how he had to turn in those collections, and any essential information necessary to the operation of a wholesaler.

Mr. Jacobs: Mark this for identification, please.

(The document referred to was marked Defendant's Exhibit O for Identification.)

Mr. Jacobs: I show you Defendant's Exhibit O for identification, and ask you if you have seen this document or one similar to it. That, I appreciate, is a photostat of an original.

A. I have never seen this personally.

(Testimony of J. D. Casaday.)

Mr. Fink: Pardon me, may I have the courtesy of seeing it, please?

Q. (By Mr. Jacobs): Mr. Casaday——

Mr. Fink: Just a moment, please. I would like to look at this document.

Mr. Jacobs: I have not asked a question on it, and I have not offered it in evidence.

Mr. Fink: You have had it marked for identification.

Mr. Jacobs: Is that any reason to interrupt the testimony, your Honor?

The Court: Well, let's not get all mad at one another about a little thing like that.

Q. (By Mr. Jacobs): Mr. Casaday, do the wholesalers receive instructions as to the obligations of the vendor under his contract?

A. I am sorry, I did not hear that, Mr. Jacobs.

Q. Do the wholesalers receive instructions as to the obligations [291] under the contract between the Publishers and the News Vendors Union?

A. The contract has been explained to the wholesalers.

Q. You explain to the wholesalers the sales period, when the vendors are expected to be on the corners. Is that correct?

A. The wholesaler knows what time they are supposed to be there.

Q. How does he know that?

A. Because it has been a practice that has been built up for a period of years.

(Testimony of J. D. Casaday.)

Q. And occasionally, when you get a new wholesaler, he has to be told, does he not?

A. He is told when vendors are supposed to be there on the entire district.

Q. Also he is told what to do in case a vendor is drunk on a corner, is he not.

A. Of course.

Q. Also he is told—what are his instructions in that regard? A. I beg pardon?

Q. What are his instructions in a case where he finds a vendor drunk on the corner?

A. His instructions are either to call in on the telephone verbally and make a report of it, or file a memorandum when he leaves his shift.

Q. Have you ever known, in the years 1937 to 1940, where a wholesaler checked out a news vendor before the end of the sales period because he was drunk?

A. Not to my personal knowledge.

Q. You have never heard of any vendor being checked in before [292] the end of the sales period because he was drunk? A. Not personally.

Q. Have you heard it through reports of your subordinates?

A. Well, if I had heard that, Mr. Jacobs, I would have heard it personally.

Q. Have you given instructions to wholesalers what to do in case a vendor fails to stay on the corner during the sales period?

A. That is a matter of complaint for the Union.

(Testimony of J. D. Casaday.)

Q. What are the instructions?

A. Explain that question, Mr. Jacobs.

Q. I ask you what instructions are given the wholesalers with respect to vendors who they find do not stay on the corners?

A. They make a report to the night circulation manager, or one of the circulation managers, and they take it up with the business agent of the Union.

Q. You spoke of a written memorandum made by the wholesalers. Was there ever a written form employed for the use of the wholesaler with respect to complaints about how vendors acted upon a corner?

A. There could have been without my knowing it. I don't see every form in the entire operation, Mr. Jacobs.

Q. In other words, every time a wholesaler is instructed to observe whether a vendor performs the obligations under the contract and to report it to the night side manager, or the City day side manager, is that right? [293]

Mr. Fink: I object to that as being unintelligible, at least to me.

Mr. Jacobs: I will reframe the question.

Q. In general the wholesalers are instructed to observe whether the news vendors perform their obligations under the contract and to report it to the night circulation manager or the day circulation manager. Is that correct?

A. No, that is not correct, Mr. Jacobs. They certainly are not instructed, and do not report

(Testimony of J. D. Casaday.)

every minor violation of a news vendor in regard to their individual contracts.

Q. What do they do? Do you forbid them to discuss violations with the vendors?

A. We do not forbid them to talk at any time.

Q. Don't you know, as a matter of fact, Mr. Casaday, that they do talk to the vendors, give warnings to the vendors, because of violations of the contract?

A. No, I do not know that, Mr. Jacobs. I do know they offer suggestions to the vendors at times.

Q. And what is the nature of those suggestions?

A. Well, Mr. Jacobs, that *certainly be* individual cases. I could not answer that question.

Q. Do they suggest to the vendors that they better perform the contract, about particular violations? A. They do not.

Q. What do you mean?

A. I mean if there was any way of assisting a news vendor, to help him increase his profits, and the wholesaler knew of something of that kind, I am sure he would make a suggestion to the news vendor.

Q. Can you give an example of such a suggestion? A. Not offhand.

Q. You don't know of any suggestions at all that have been made. A. Oh——

The Court: What is the materiality of this line of examination? I would like to know where we are going in order to follow the testimony.

(Testimony of J. D. Casaday.)

Mr. Jacobs: Those suggestions, as Mr. Casaday puts it, are nothing more nor less than instructions. I want to show the scope and the amount of suggestions given to the vendors by the wholesalers.

The Court: Well, does that enter into the suggestion as to whether or not they are employees?

Mr. Jacobs: Mr. Fink seems to think they have no contract with them. Mr. Fink thinks it is material.

The Court: But if it is true that they were independent contractors, they could have a relationship with them all the time, could they not?

Mr. Jacobs: Yes, your Honor, but may have the relationship of employees, and the nature of the advice and suggestions and orders given to employees and to independent contractors is different.

The Court: Well, if I have an independent contractor [295] dealing with me, I have a right to terminate that relationship, and I would have a right to say to you, "if you don't do it the way I suggest to you, I am going to terminate the relationship." That would not make an independent contractor an employee, would it?

Mr. Jacobs: No, your Honor, but if suggestions are continually given and threats of termination, I think that is tantamount to employment. If the wholesaler, say, suggested "Do thus and so," and the vendor is not amenable to those suggestions, they can terminate the relationship. I think that is equivalent to a right to order and fire.

(Testimony of J. D. Casaday.)

The Court: Would that make an employment contract if, in fact, it was an independent contractor? If there was a right to discontinue the relationship? I am trying to follow this line of examination. I am making this inquiry, "If there is an independent contractor relationship between you and me, which I can discontinue if I want to, the mere fact that I insist upon your following some suggestions, or I call your attention to some inefficient manner of your operation, would the fact that I did that convert your relationship into employment?"

Mr. Jacobs: No, your Honor, but the premise to your question still is whether an independent contract relationship exists. That is what the plaintiffs have to prove. And to prove this, they say that the suggestions are nothing more [296] than suggestions. I think the Court may well interpret that the suggestions are orders, ordinarily given by an employer to an employee. That is the purpose of the question.

The Court: Well, I think the issue is pretty narrow in this case. I think we have taken an awful lot of time on insignificant matters. After all, we are informed by the text book writers that this is a free country; a man can make any kind of contract he wants to; it is not for the security administration to tell anybody what kind of a contract he should make. The only question is whether or not he simply makes a contract and in fact they are doing something else than they agreed to, either

(Testimony of J. D. Casaday.)

for the purpose or having the effect of converting it into a different relationship, or a different status. So, I don't quite see. If there is, in fact, an independent contractor relationship, then the fact that there is conduct and suggestion, or even ultimatums from one party to another, would not change the relationship.

Mr. Jacobs: That is quite correct, your Honor, if the relationship exists, but that is the question before the Court.

The Court: I realize that.

Mr. Jacobs: And particularly if this Court is to determine from the evidence how the people behaved in their day to day working conditions as indicative of the relationship, we think suggestions and orders given to the vendors is quite definitely pertinent or material. Your Honor will examine all the evidence and see how they behaved with each other. It is obvious that persons in the relationship of independent contractors do not deport themselves in the same manner as employees or employers.

The Court: They don't.

Mr. Jacobs: Now, I mean, the employer says, "You do thus and so." With independent contractors, he cannot do that. Now, what Mr. Casaday calls "suggestions," that is an euphemistic term tantamount to nothing but an order, particularly when it spells out the rights of parties to other conditions in the contract.

The Court: You are getting closer to what I am getting at. Assuming it is an order, what has that got to do with it?

(Testimony of J. D. Casaday.)

Mr. Jacobs: It is one of the indications of an employment relationship.

The Court: Well, again you come back to the question I asked a minute ago. If you are an independent contractor, and building a building for me, and I have a right under our contract to discontinue your activities, and I tell you, "You put that beam up that way or I am going to get somebody else to do it," that would not make you my employee, would it?

Mr. Jacobs: No, your Honor, if I was in fact an independent contractor before.

The Court: But, the fact that I give you an order does not transform the independent contractor relationship into an [298] employee contact, merely because I do tell you to do something and as a penalty, I say I will take the contract away from you.

Mr. Jacobs: Normally an employer gives orders and instructions to an employee, depending upon the position.

The Court: I fully appreciate that. If you are under my direction, you have to work exactly the way I tell you to do it, and I control you at all stages of the work. That applies in the cases of an employer and employee relationship. But, that is a little different from the case of if, in fact, you were building a building for me as an independent contractor, I have the right to discontinue your activities at any time. The fact that I give you

(Testimony of J. D. Casaday.)

orders, or even directions, still that would not make an employer and employee relationship.

Mr. Jacobs: If it please the Court, this line of questioning as to whether instructions and orders was given, was opened by plaintiffs' counsel, not by me. They felt the matter was material to show that no orders were given. Your Honor accepted that.

The Court: Well, evidence of what they actually did is pertinent. Well, I am just trying to narrow the issue to see exactly what I have to decide. That is what prompted my question.

Mr. Jacobs: I also want the Court to understand the Government's position. Regardless of whether any instructions [299] or orders were given, under the terms of the Union agreement, the obligations of the vendor are such that an employment relationship must be construed as a matter of law.

The Court: Isn't this the situation in this case: I imagine most of the evidence is going to be cumulative. Isn't this question a mixed one of fact and law that is going to present itself? The newspaper publishers have a right, of course, to make an independent contract if they want to. It is no business of the security administration if they want to. You cannot say, "We want to collect some taxes, so you have to make an employee contract." There is no question about that.

Mr. Jacobs: That is right.

The Court: Now, they start out obviously attempting to create an independent contractor rela-

(Testimony of J. D. Casaday.)

tionship. Now, isn't the only question involved in this case, whether they succeeded in that or whether the course of conduct in some way indicates that has, in fact, become an employer-employee status?

Mr. Jacobs: I don't quite agree with everything your Honor said.

The Court: Is there some question of fact still involved in the first consideration mentioned, namely, that they did not start out to do that? That maybe it was fraudulent, or a conspiracy? [300]

Mr. Jacobs: No, your Honor. If you were to go to the motive, the motive in Clause 1 of the original agreement where it stated the relationship was not that of employer and employee, and you compare that with the other obligations of the vendor, it was the motive of the publishers to get from the vendors all the obligations that they would get with an employment relationship and at the same time avoid responsibility that goes with being an employer. That to me is evident. No employer wants to bear the responsibility of an employer, whether it be for taxes or what.

The Court: Was there anything wrong about doing that? If I want to make a contract with you and I don't want to be an employer, I want to avoid the responsibility, there is nothing in the law to prevent me.

Mr. Jacobs: But, you cannot have your cake and eat it too, to apply a homely phrase. We are getting into argument.

The Court: I appreciate that, but I just wanted to see.

(Testimony of J. D. Casaday.)

Mr. Jacobs: If I say to Mr. John Doe, "You will work where I tell you, when I tell you to work, under the conditions I tell you to work," regardless of what I say to him, let's assume it is ditch digging, "regardless of how I tell you to use your shovel, you are an employee." There is nothing I can say that can change that relationship, whether it is in writing or otherwise. I think there is nothing more eloquent, nothing more moving than the testimony of the plaintiff's [301] witness Mr. Parrish who says there is only one manner to sell newspapers. What does it mean when he says "I don't instruct you how to sell the newspapers." It does not mean a thing. No instructions are necessary, Mr. Parrish said so. Now every other aspect of employment relationship exists here. If it was not for that phrase, we submit at the outside there would not be any question to that, that the relationship was that of employer and employee, and these parties by contract cannot state, "Why, regardless of what we are, we want to be considered, so far as third parties are concerned, independent contractors." The newspapers did bind each other as to the relationship, but they cannot bind the Government and say, "Because we say we are independent contractors, it must be so." I want to make myself clear on that.

The Court: I have been kind of egging you on so you would state your position, because it helps me rule on the evidence.

(Testimony of J. D. Casaday.)

Mr. Jacobs: That is the reason, I submit to the Court, why we said this case could be decided on the motion, so far as the defendant is concerned. Plaintiffs wanted to put on evidence to show there was no control, that no instructions were given. I think with the showing at the time the witness said that no instructions were necessary, every other aspect of the relationship is spelled out in the contract, what they did with the product, where they work, when they work, that [302] is in the contract. The only thing, Mr. Fink belabored us that they have no right to exercise control, they cannot exercise control. This witness testified that they can work around the corner. I submit, your Honor, that if I, as a news man with the ability to work a 50 square foot area, it does not give me such discretion as makes me an independent contractor. There is not a single thing in the contract that makes them independent contractors.

The Court: Of course you can argue this later. I suppose the Court brought this on itself.

Mr. Linn: I suppose the critical language of Judge Cardoza in the New York case of *Guilmi vs. Netherlands Dairy Co.*, which was the case of a dairy route driver, who was quoted by the Connecticut Supreme Court in the case of *Jack-and-Jill vs. Tone*, probably sums it up:

“The salesman has no discretion as to the manner of performance, or none that is substantial. He travels a prescribed route from

(Testimony of J. D. Casaday.)

which he may not deviate. If he fails to work it diligently, he knows that there will be an end of his employment as surely as if he were working for a stated wage. On the one side there is an intimacy of control and on the other a fulness of submission that imports the presence of a 'sovereign,' as the master, we are reminded, was sometimes called in the old [303] books.—The contract is adroitly framed to suggest a different relation, but the difference is a semblance only, or so the triers of the facts might find."

The Court: In that case did the drivers have their own vehicles?

Mr. Linn: In the Jack-and-Jill case they had their own I think.

The Court: The Court said it was an employee?

Mr. Linn: Yes.

The Court: With their own wagon?

Mr. Linn: I think so. I am not positive on that. The Jack-and-Jill case is a recent case. The Judge Cordoza case is a very old case, when he was sitting on the Court of Appeals of New York. In other words, every element of control that could be used is spelled in the contract, except whether a man should use a bass voice or a tenor voice and nature took care of that.

Mr. Jacobs: Before the recess, may I put two things before the Court, and before I resume cross-examination, because if your Honor is of the opin-

(Testimony of J. D. Casaday.)

ion that you indicate, that the Government has a burden, if the Government has a burden, I think it should have a great latitude.

The Court: You can have all the latitude you want. What prompted my question was to see the materiality of that line of examination. [304]

Mr. Jacobs: Secondly, I want Your Honor, at this time to put in a brief of the Government and point out numerous cases in which there have been contracts between alleged independent contractors, in which they called themselves everything other than employer and employee, they called each other partners, lessors and lessees, and the court did not feel compelled by what they called themselves.

The Court: That was not what prompted my inquiry. I appreciate that it is not a question of what they call themselves; it is what relationship did they intend there, and having followed the action they decided, did they actually create it? That is the real question, isn't it?

Mr. Jacobs: It is, Your Honor.

The Court: Well, you are going to have an opportunity to present evidence in the matter.

Mr. Jacobs: Let me make that clear, Your Honor. It is very doubtful; we are depending almost entirely on the evidence elicited from this witness.

The Court: That is what I said at the beginning of this trial, I could not see that there could be much dispute as to the actual facts. As to how

this transaction was conducted, and I am sure it would become a matter of law. So far I cannot see there is very much that is subject to dispute.

Mr. Jacobs: I don't think so either.

The Court: We will recess until 2:00 o'clock.

(Adjourned to 2:00 p.m. this date.) [305]

Afternoon Session

Tuesday, April 2, 1946, 2 P.M.

Mr. Fink: If your Honor please, may I have the Court's permission to call a witness out of order, a purely formal witness to identify those photographs? That is the sole purpose.

The Court: Any objection?

Mr. Jacobs: No question but those photographs are genuine photographs. The record shows that. If he wants to call him——

Mr. Fink: I merely want to identify the corners that they were taken on. I have the witness here who will do that.

The Court: All right; put him on.

Mr. Fink: Mr. Snaer, will you take the stand, please?

SEYMOUR SNAER

called on behalf of the plaintiffs; sworn.

The Clerk: State your name to the court.

A. Seymour Snaer.

(Testimony of Seymour Snaer.)

Direct Examination

By Mr. Fink:

Q. Mr. Snaer, what is your occupation?

A. Photographer.

Q. For whom?

A. The San Francisco Examiner.

Q. Mr. Snaer, I hand you Plaintiffs' Exhibits No. 48-A to 48-H and ask you to examine them. I think they are numbered or lettered from the bottom up, Mr. Snaer. Did you take those [306] photographs? A. Yes, sir.

Q. Now, will you take them from the bottom up—I think it is 48-A; is that 48-A?

A. That is right.

Q. Now, will you identify the corner upon each one of these photographs were taken, please? They are all in the City of San Francisco, are they?

A. Yes, sir, this photograph——

Q. When you say "this," that doesn't mean anything.

A. 48-A was taken on the corner of Walnut—or, rather, I am trying to think. Chestnut and—I am trying to refresh my mind on that corner down there.

Q. Have you got a memorandum?

A. It is in the Marina. I neglected to bring it with me. I didn't know I was going to be called today on this. Maybe if I could just go on to some others and then come back to this——

(Testimony of Seymour Snaer.)

Q. Go ahead; identify them any way you wish.

A. This photograph was taken on the corner of Montgomery and Pine. This is No. 48-B.

48-C was taken on the corner of Grant Avenue and Market Street. 48-C.

48-D was taken on the corner of Grant Avenue and Sutter—well, rather, Grant Avenue and Geary.

Photograph 48-E was taken at the Terminal—San Francisco East Bay Terminal.

48-F was taken on the corner of Ellis and Powell.

And 48-G was taken on the corner of Third and Market. [307]

And 48-H was taken on the corner of Van Ness and Market. Right at the corner of Van Ness and Market.

And 48-A was taken on the corner of—in the Marina District; the street has slipped my mind.

Q. Is it Chestnut and Powell?

A. No, not Powell. Chestnut and——

Q. Fillmore? Chestnut and Fillmore?

A. No, it is about three blocks up from—Oh, Fillmore?

Mr. Jacobs: I will stipulate wherever it is——

A. Yes, I think it is.

The Court: It is taken in the Marina District?

A. Yes, that's right.

Q. (By Mr. Fink): On Chestnut Street?

A. Yes, that's right.

Mr. Fink: That is all.

(Testimony of Seymour Snaer.)

Cross-Examination

Q. (By Mr. Jacobs): Which of these photographs are taken in what could be called the main business section of San Francisco?

A. Well, I would say that most of them—most of them were taken in the main business section of San Francisco.

Q. Just for the record—everybody may know where these locations are—which of these photographs was taken outside of the main business district—which of these locations?

A. I think just one there, that one that I said I had trouble in finding the name—this one here, I would say, would be [308] the only one that would be out of the main district, that one there (indicating). All the others are in the business district.

Q. That is Plaintiff's Exhibit No. 48-A?

A. That is right. The others, they are all distributed around the area of business.

Q. Do I understand you correctly, all but 48-A are in the main business district of San Francisco?

A. That is what you would consider the main business district. I don't know how you could define it, but as far as my definition goes, they were all taken in the——

Mr. Jacobs: No further questions.

Mr. Fink: No further questions.

(Witness excused.)

Mr. Fink: Mr. Cassaday.

J. D. CASADAY

called for the plaintiffs, resumed the witness stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Jacobs:

Q. Mr. Casaday, before you get on the stand, will you get the Audit Bureau Circulation Reports?

Mr. Fink: I have them.

Q. (By Mr. Jacobs): Mr. Casaday, you stated on direct examination that in 1937 out of 225 corners or locations where the San Francisco Examiner was sold, on about 220 of them no [309] guaranty was paid. Now, from what source did you derive that information, Mr. Casaday?

A. I don't recall saying that, Mr. Jacobs.

Q. Do you recall your testimony as to the number of corners on which guaranties were paid in 1937?

A. I think so.

Q. Will you repeat that, then, please?

A. As I recall, my testimony was, out of about 250 corners——

Q. Yes.

A. ——that we made up the difference between the amount of guaranty and the amount of the profits on the sales on approximately fifteen to twenty-five corners. I think—that is, as I recall my testimony.

(Testimony of J. D. Casaday.)

Q. What is the source of your information for that statement? How do you recall the figure?

A. Well, the memorandum slip comes to me for approval for the payment of this difference between the profits and the guaranty on certain locations whereby the profits have not equaled the guaranty.

Q. How do you remember the number, approximately fifteen to twenty of them?

A. Well, as you say—as you just said, it is approximate.

Q. Yes. How did you know it was not fifty or a hundred?

A. How do I know?

Q. Yes.

A. Well, I have a pretty fair memory when it comes to O.K.ing anything paid out.

Q. Were any records kept of those corners on which the [310] guaranties were paid?

A. No, they were kept—there would be a memorandum at that time, but we haven't kept them because there was—to our knowledge, there was no material reason for keeping them.

Q. You recall the number of corners on which guaranties were paid, but you can't recall the number of wholesale districts in that period?

A. I told you approximately how many there were.

Q. Between ten to twenty?

A. That is right.

Q. They varied that much in 1937 to 1940?

A. It could.

(Testimony of J. D. Casaday.)

Q. Did it? A. Yes.

Q. It varied from ten to twenty in that period?

A. I said, "approximately," Mr. Jacobs.

Q. In 1937 do you know how many districts there were? A. In 1937?

Q. Yes. A. No, I don't.

Q. Do you remember in 1938? A. I do not.

Q. '39? A. Not in any individual year.

Mr. Fink: If your Honor please, let the record show that I am handing to counsel the Audit Bureau of Circulation Reports for the years 1937, 1938, 1939 and 1940. I will state to the Court that that is our only copy, as far as the Examiner is concerned.

Mr. Jacobs: Will you mark these four for identification; please? [311]

The Clerk: Defendant's Exhibits P, Q, R and S for identification. The year 1937 is marked P; '38 is Q; '39 is R, and '40 is S.

Q. (By Mr. Jacobs): Mr. Casaday, I show you Defendant's Exhibits for Identification P, Q, R and S, and ask you if you recognize them?

Mr. Fink: You don't have to identify those; they are admittedly Audit Bureau of Circulation Reports.

Mr. Jacobs: I want to examine this witness on the knowledge of the witness. May I be permitted to proceed?

The Witness: What is the question?

Q. (By Mr. Jacobs): Do you recognize those documents? A. I do.

(Testimony of J. D. Casaday.)

Q. What are they?

A. They are reports of the Audit Bureau of Circulation on these periods that they cover.

Q. Are these facts and figures shown in these reports taken from the books and records of the San Francisco Examiner? A. That is correct.

Q. And they are audited by the Audit Bureau of Circulation, are they not?

A. That is correct.

Q. Do you know what function these reports serve?

Mr. Fink: Objected to upon the ground that it is immaterial, irrelevant and incompetent.

Mr. Jacobs: May it please the Court, these reports cover all forms of circulation by this newspaper, all forms of [312] distribution, including sales by street vendors specifically. We think it is most vital, most material to the Court, to determine what part this particular form of distribution plays in the entire scheme of the Examiner over all circulation.

The Court: You mean what volume?

Mr. Jacobs: Volume and method. For instance, your Honor, this report gives——

The Court: Can't you agree to that? Why do we have to take up a lot of time with a lot of records?

Mr. Jacobs: We will introduce them in evidence.

The Court: Can't you agree as to what was the volume of business? Is that what you are trying to get at?

(Testimony of J. D. Casaday.)

Mr. Jacobs: These will be introduced in evidence, your Honor.

Mr. Fink: If your Honor please, I don't like to encumber the record. We have already got, I imagine, close to a hundred exhibits, haven't we? I imagine close to a hundred exhibits. Upon counsel's statement as to the purpose, I submit that my objection is good. We are here investigating a contract and the intent of the parties and the construction of the parties under a contract. Now, what part the circulation may have in interpreting that contract or in interpreting the construction the parties put on it, I can't see.

The Court: Counsel says he wants to show how much of the [313] circulation is attained through street corner vendors, is that it?

Mr. Jacobs: There are other facts in here. I could take up the time of the Court ad infinitum concerning the facts which we think pertinent in here such as percentage of returns. If the Examiner is in business simply to sell newspapers to the vendors, they are not concerned with returns, but these reports and this examination will bring out from this witness and show the percentage of returns through street vendors and other sources.

The Court: Unsold newspapers, you mean?

Mr. Jacobs: Yes. This is a complete statement of the manner in which the Examiner operates. I know of no easier way to explain it to the Court.

The Court: Let them be admitted, then. Do you wish to make an objection?

(Testimony of J. D. Casaday.)

Mr. Fink: I make the formal objection that they are incompetent, irrelevant and immaterial.

The Court: Very well. The objection will be overruled.

Mr. Jacobs: They are offered in evidence at this time.

The Court: They may be admitted.

(Thereupon the documents referred to were marked Defendant's Exhibits P, Q, R and S respectively, in evidence.)

Q. (By Mr. Jacobs): I asked you before, and you didn't have an opportunity to answer the question, Mr. Casaday, what [314] function these reports serve? A. What function these reports serve?

Q. Yes.

A. Why, they are intended to be a true report of the amount of circulation we have in the various branches of the circulation organization for the purpose of records that may be used for various things connected with the sale of advertising, the sale of the newspaper itself, et cetera.

Q. Advertisers look to this report to determine the net paid circulation of the paper at various points and through various means, is that correct?

A. I would say that is correct.

Q. Is it true also that the Audit Bureau of Circulation verifies and audits the figures furnished by the publisher, including the Examiner, to determine the accuracy of the figures? Is that correct?

A. Through the records kept by the Examiner.

(Testimony of J. D. Casaday.)

Q. Mr. Casaday, your papers are released in various editions. After a second edition is released, is the first edition readily salable?

A. I didn't get the last part of that question.

Q. The San Francisco Examiner is sold in various editions, is it not? A. It is.

Q. After the second edition is available for sale, is the first edition readily salable?

A. I don't know what you mean by "readily."

Q. Do people tend to buy the first edition when there is a later edition available? A. At times.

Q. In other words, you tell the Court that people normally buy older news?

A. Not necessarily. In my own case, in a great many instances it doesn't make any difference to me whether I get the first, second or third edition of a paper.

Q. Are you familiar with the reading habits of the public as they are concerned in buying papers?

A. That is right.

Q. What would you say their habits were in that respect?

A. I would say that the average reader—and I do say the average reader—would rather have the latest edition, but it doesn't always mean that the latest edition has later news in the paper than the previous edition.

Q. I didn't say it did. The tendency normally is to buy the later edition, isn't that so?

A. That is true.

(Testimony of J. D. Casaday.)

Q. Did you hear Mr. Bitler's testimony about the necessity of having papers available at specific times and places to make them salable?

A. I don't recall Mr. Bitler's testimony.

Q. Now, Mr. Casaday, in Defendant's Exhibits P. Q. R and S, I notice there is an item there of the amount sold through street vendors. Does that include the amount sold by the union vendors here?

A. May I see those? [316]

(Documents handed to the witness.)

A. (Continuing) Are you referring to this front page?

Q. Yes.

A. Their sales would be included in this figure.

Q. Mr. Casaday, isn't it true that also during the years 1937 to 1940 newspapers were sold on the streets of San Francisco through coin racks?

A. That is correct.

Q. Is it a relatively accurate description to describe those coin racks as a small metal box containing the name of the San Francisco Examiner, a place for a placard, and a place to drop the coin for the paper?

A. That would be a fairly accurate description.

Q. And those coin racks are the property of the San Francisco Examiner, are they not?

A. They are.

Q. And newspapers are placed in those racks by the wholesalers, are they not?

A. That is correct.

(Testimony of J. D. Casaday.)

Q. Can you tell me approximately how many coin racks there were used by the San Francisco Examiner for the sale of their papers in 1940?

A. In 1940?

Mr. Fink: Your Honor, I don't want it to appear that I have any objection to this line of questioning, except to question the relevancy or materiality of it. I have no actual objection, and if the Court deems it material I will keep quiet, but it seems to me we are going very far afield, and I interpose the purely formal objection that it is immaterial, [317] irrelevant and incompetent.

Mr. Jacobs: Recognizing the formality of counsel's objection, so there can be no doubt what the Government has in mind, these papers are sold through the coin racks by people who are admittedly employees of the publisher on the corners of streets in San Francisco by people admitted to be their employees, and we submit it is quite relevant to show that what they contend is a sale by independent contractors is also accomplished in the same way and under relatively the same circumstances by people who are admittedly their employees.

The Court: Well, you can bring out the facts and argue from that, I suppose.

Mr. Jacobs: I am stating the purpose to the Court to show that we are not wandering afield.

The Court: But I don't quite see the connection. What is the connection between the San Francisco Examiner or Chronicle owning some racks and through its own employees putting the papers on

(Testimony of J. D. Casaday.)

the racks in the public streets where a person wanting to buy one can put a coin in the box? What has that got to do with the status of the men who personally sell papers on the street corners?

Mr. Jacobs: The connection is this, may it please the Court: This corporation, Hearst Publications, is engaged in having the newspapers sold on the streets of San Francisco. [318] They are not interested—obviously not interested in selling to vendors; they couldn't get any advertising through that. I think that is argumentative, but it is a fact that they sell them through various means; they sell them through street vendors on the public streets, people whom they dispute are their employees. Now, on the same street corners, in some cases right alongside of them, you have a coin rack where the same papers are sold through men admittedly their employees.

The Court: No; they don't have any men selling the papers on the racks, do they?

Mr. Jacobs: They are serviced by the men, the wholesalers.

The Court: I don't see the connection, but you can bring it out. I suppose they deliver papers to news stands in hotels and all over. That would be similar and that would be another method of the distribution of newspapers. The fact that it is done some other way doesn't throw any light on this matter. I wouldn't think, but I would take it for granted that that is the fact. I see them all over San Francisco; everybody sees them; I don't think you have to——

(Testimony of J. D. Casaday.)

Mr. Jacobs: I would like to bring it out, what this Court may judicially notice within your own knowledge.

The Court: All right.

Have you any idea about how many of those racks there [319] are or were at the time?

A. Approximately.

Q. How many? A. A thousand.

Q. About a thousand in the years 1937 to 1940?

A. That is right.

Q. (By Mr. Jacobs): Isn't it true also, Mr. Casaday, that the wholesaler who places the paper in the racks makes the same amount per paper as the street vendor? A. No, it is not.

Q. Well, how much does the wholesaler who places the paper in the rack make per paper?

Mr. Fink: Just a minute. That is objected to as incompetent, immaterial and irrelevant.

Mr. Jacobs: It has been held by the authorities——

The Court: I will overrule that objection.

Q. (By Mr. Jacobs): How much does the wholesaler make per paper? A. No one knows.

Q. The papers are sold——

The Court: I don't think that the witness understood your question.

The Witness: Yes, I did, your Honor.

Mr. Jacobs: The amount per paper.

The Court: He wants to know what the man who puts the paper in the rack gets?

A. I understand. No one knows, because no one knows how much he collects from the rack. [320]

(Testimony of J. D. Casaday.)

Mr. Jacobs: The amount per paper, not the total.

A. I understand it would be the total, Mr. Jacobs, because he don't collect for each individual paper.

Q. I will put it this way: Papers are sold on the racks at the retail price of five cents marked on the rack, is it not? A. That is right.

Q. For every newspaper which is sold isn't there a specific amount which the wholesaler makes?

A. May I answer it correctly?

The Court: Yes, go ahead.

A. For every paper he sells and collects for he would make a certain amount.

Q. (By Mr. Jacobs): What is that certain amount?

A. If he collected for each paper that was taken from that rack he would make a cent and a half.

Q. A cent and a half. And that is slightly less than the news vendor gets? A. I beg pardon?

Q. That is slightly less—the news vendor gets two cents?

A. That is correct. Quite a substantial amount, I would say, Mr. Jacobs.

Mr. Fink: The difference is 25 percent, isn't it?

Mr. Jacobs: You can carry on the mathematics, Mr. Fink, as you please.

Q. Mr. Casaday, as I understand it, the wholesaler, when he makes his first delivery of the papers to the corner where [321] the vendor is supposed to be—let us assume that the vendor isn't there at

(Testimony of J. D. Casaday.)

the appointed time when the papers are dropped, what is the wholesaler expected to do about it?

A. I don't quite understand the question, Mr. Jacobs.

Q. In the event that the wholesaler, in making delivery of the papers to the corner, should find or fail to find that the vendor is not there during the sales period when he is supposed to be there, what is the wholesaler expected to do about it?

A. Use his own judgment.

Q. You are indifferent to what he does about it?

A. I beg pardon?

Q. You as circulation manager are indifferent to what he does about it?

A. It isn't a matter of being indifferent. Our wholesalers are fairly competent people, and they know what to do about it.

Q. What do they normally do about it?

A. I can't say what they normally do, because that would be a different practice with each individual wholesaler.

Q. Isn't it true that normally the wholesaler calls in to the circulation department and notifies them of that fact?

A. Not necessarily so. He may come back there later to see if the vendor has appeared up to that time.

Q. Let us assume that he finds the vendor there on his return trip, do you know what, if anything, the wholesaler would normally say to the vendor in case he was late in reporting there? [322]

(Testimony of J. D. Casaday.)

Mr. Fink: Just a moment, if your Honor please. Objected to as incompetent, irrelevant and immaterial, and asking for the state of mind of some third person.

The Court: Yes, I think it is very speculative. I will sustain the objection.

Q. (By Mr. Jacobs): Don't you know from reports or of your own personal knowledge that normally a wholesaler will make a suggestion to a vendor who was late on the corner?

A. Frankly, Mr. Jacobs, I wouldn't know what the wholesaler would say.

Q. You don't know whether they follow your instructions or not?

A. I didn't give any instructions with regard to that. I didn't say I did.

Q. You think that the wholesaler is free to allow the vendor to do as he pleases on the corner?

A. I didn't say that.

Q. What does he do? A. I don't know.

Q. Have you any instructions as to what he is supposed to do?

A. He uses his own judgment. That is what I told you. He knows what to do.

Q. You trust to his judgment implicitly?

A. As long as he is doing a good job.

Q. Have you ever had any reports of what they do? A. Personally, no. [323]

Q. What is required of a wholesaler to do a good job? A. Give good service.

Q. To whom? A. To everyone he serves.

(Testimony of J. D. Casaday.)

Q. How do you know whether he does that or not?

A. Well, we would ultimately receive complaints from one source or another, even up so far as the publisher.

Q. Have you ever received reports, Mr. Casaday, that the wholesalers frequently and wrongly tell the vendors what to do and what not to do?

A. I have not.

Q. What reports do you get on the activities of wholesalers?

Mr. Fink: On the activities of wholesalers, was that the question?

Mr. Jacobs: Yes.

Mr. *Jacobs*: Objected to as incompetent, irrelevant and immaterial.

The Court: I will overrule the objection.

Q. (By Mr. Jacobs): Will you answer the question, please?

A. What reports do I get on the activities of the wholesalers? Well, I might get a report that he was speeding recklessly down the street in the truck. I might get a report that he was haranguing with a streetcar motorman. I might get a report that he was late in delivering the papers to a certain news stand.

Q. Have you ever gotten reports of differences of opinion between the wholesaler and the news vendors? [324] A. I have not.

(Testimony of J. D. Casaday.)

Q. Have they always worked in perfect harmony?

A. I didn't say that, Mr. Jacobs. You asked me if I had had any report.

Q. Do you know whether they have always worked harmoniously?

A. I don't believe that they have always worked harmoniously, no.

Q. And what differences of opinion arise between them?

A. I couldn't answer that. There is too many differences of opinion could arise between any two people.

Q. You don't know of any specific differences?

A. I do not.

Q. Do I understand you correctly that when you open up a new corner you notify the union you would like to have a union member fill the corner, is that correct?

A. I didn't say that, Mr. Jacobs.

Q. What do you normally do when you open up a new corner?

A. It has been so long since we have opened up any new corners I wouldn't know.

Q. You don't remember ever having opened up a new corner, is that it?

A. Not in recent years.

Q. In 1937 to 1940?

A. Not even then we opened up any new corners in my memory. Please don't misunderstand me. I am not speaking of vacancies in established locations. You said new corners. [325]

(Testimony of J. D. Casaday.)

Q. Yes. When you are notified of a vacancy, let us say, by the wholesaler, that the corner is not filled, you normally call up the union officials, as I understand it, and ask them to supply a vendor, and they will name a list, is that correct?

A. That is correct.

Q. And you select somebody from that list?

A. From that list.

Q. There have been occasions, haven't there, when you have rejected people?

A. I beg your pardon?

Q. There have been occasions, have there not, when you have rejected suggested news vendors?

A. There have been occasions when we have rejected people on that list who we did not feel were even competent to stand up on these corners.

Q. What do you look for as to a satisfactory news vendor in determining their competency?

A. Well, somebody that can stand up and hold papers.

Q. Would it be fair to state that you expect them to be on the corner there during the sales period, to stay there on the corner and to be physically able to sell papers and take an interest in selling papers?

A. I think that would be extremely fair and reasonable to expect that.

Q. Let us assume that a vendor, by reports from wholesalers, indicates that he is deficient in one of those four qualities, [326] what is done about it?

A. He is deficient?

(Testimony of J. D. Casaday.)

Q. Yes.

A. The matter is taken up with the union.

Q. Does the wholesaler ever speak to the vendor about his deficiency?

A. I couldn't answer that, Mr. Jacobs, because I am not there at that time.

Q. You have never heard any reports of a wholesaler speaking to a vendor and suggesting that he improve his performance?

A. I would like to understand that question very clearly, if you don't mind.

Q. Have you ever heard of any case where a wholesaler has spoken to a vendor, let us assume, because he didn't stay on the corner during the sales period?

A. No, I haven't heard of any individual case.

Q. Have you heard of cases generally?

A. No. I might go so far as to say that I assume that our wholesalers offer constructive suggestions for the improvement and increase of sale of our newspaper.

Q. What sort of suggestions would they offer?

A. I think that is the question we left off on this morning.

Q. That's right; we are coming back to it in a different way.

A. All right. I would think that the wholesaler might suggest to the vendor that there is a show break at 10:20 and he might sell more papers if he covers that show break. I presume that he might suggest that if we had a good sales headline to be

(Testimony of J. D. Casaday.)

sure and display that headline so that prospective [327] buyers could see it.

Q. Would he suggest that he hold the paper out?

A. No, not necessarily. In most of these sales locations they have display racks that the vendors put their paper in there for display. On our paper, Mr. Jacobs, if you want me to give a report, almost entirely we are combined with our competitor in consolidated sales locations, and the vendors of their own free will and accord do not give preference to either paper by holding it out. If they have a sales rack at their location they will display both papers on these sales racks, and when the customer comes up he will ask, usually, for the Examiner, but whatever paper he wants.

Q. On appropriate occasion, would the wholesaler suggest to the news vendor that it would be to everybody's interest to stay more sober?

A. To stay more sober?

Q. Yes.

A. I couldn't answer that, but I don't think that would be too far out of line if the man was under the influence of liquor, that it would be for the public welfare that he stay sober.

Q. There have been cases for the welfare of the San Francisco Examiner that he would suggest that he state the headlines to the public?

A. That he state the headlines to the public?

Q. Yes.

A. Not for the San Francisco Examiner, because if he was selling both papers he would be stating [328] the headlines ordinarily of both papers.

(Testimony of J. D. Casaday.)

Q. Are your wholesalers concerned with sales of the San Francisco Chronicle?

A. Concerned with them?

Q. Yes. A. Oh, no.

The Court: Mr. Jacobs, if everybody who suggested to somebody else that they remain sober was thereby deemed to be an employer-employee basis, I think that would be getting into a very difficult situation.

Mr. Jacobs: I am sorry, your Honor; I shouldn't have treated the subject so lightly.

The Court: I don't see any importance to that.

Q. (By Mr. Jacobs): When you engage a vendor under a contract with a vendor to sell papers at a particular corner is it for an indefinite period, or a week or a month, or what is it?

A. Well, ordinarily, when a contract is given to a vendor for a particular corner, at first it is on a temporary basis, but normally it becomes a permanent sales location for that vendor if he——

Q. What is the temporary period?

A. Oh, approximately two or three days to a week.

Q. During that period the wholesaler observes the competency of the vendor?

A. I think not only the wholesaler, but the business manager of the union observes, you might say, the efficiency or the ability to stand up and hand out papers in return for nickels. [329]

Q. How does he judge that efficiency? By the number of papers sold? A. Not necessarily.

(Testimony of J. D. Casaday.)

Q. How does he judge it?

A. Well, more by his ability to stand up and be clean and courteous.

Q. The business manager goes out on the street and observes news vendors?

A. I think the business manager goes and observes the news vendors more than the wholesaler.

Q. Oh, you are talking about the business manager of the union? A. Yes.

Q. Is the San Francisco Examiner circulation department interested in the competency of the news vendor during the temporary period?

A. Of course.

Q. I ask you again, does the wholesaler observe that? A. I said he undoubtedly did.

Q. Does he report that to his superior with a recommendation that the man be retained or not be retained? A. I imagine he does.

Q. Isn't it also true that a wholesaler, from time to time, makes recommendations that a particular vendor be transferred to another corner?

A. No, I am afraid that isn't true.

Q. Let us say that an old corner becomes vacant and it is a lucrative corner and has got to be filled by someone, could the wholesaler recommend that an old vendor be given a more lucrative corner?

A. I think he could recommend, Mr. [330] Jacobs, but I don't think it would particularly carry any weight. That is usually arranged between the business manager of the union and either the night or morning circulation manager.

(Testimony of J. D. Casaday.)

Q. You have never made any independent selection of your own? A. I beg your pardon?

Q. Have you ever made any independent selection of your own from a news vendor already under contract?

A. Have we ever made any independent——

Q. Selection of your own?

A. No, it has been done jointly with the union. It is usually done in harmony, subject, Mr. Jacobs, of course, to the right of selection we have in the list that they submit to us, which is specifically stated in the contract.

Q. You spoke about these racks, Mr. Casaday, on which he displays the paper. Those racks are owned by the San Francisco Examiner?

The Court: He has testified to that. Let's not backtrack. I am willing to be very patient in this case, but I am not going to hear this story over and over again, about these racks. You are making a simple problem unnecessarily complex. I have heard the story now about the racks and the wholesalers and these men, now, over and over again for three days.

Q. (By Mr. Jacobs): Well, Mr. Casaday, when the wholesaler [331] receives a delivery from the supervisor of a number of papers on the first edition, is any record made of the amount he receives on that edition?

A. There is a memorandum made by the supervisor, because he has to collect from the wholesaler for those papers. There isn't necessarily any permanent record made of it.

(Testimony of J. D. Casaday.)

Q. No form record you use?

A. I beg pardon?

Q. Is there any printed or mimeographed form record?

A. Not to my knowledge, Mr. Jacobs.

Q. There wasn't any during the years 1937 to 1940?

A. I couldn't answer that truthfully. I don't recall just exactly what form of memorandum they would use. We didn't have anything for official records—necessary for official records, only by districts as a whole.

Mr. Jacobs: No further questions.

Redirect Examination

By Mr. Fink:

Q. Mr. Casaday, during your thirteen years' experience in San Francisco, have you had an opportunity to observe the operation of the other three newspapers in San Francisco?

A. To some extent.

Q. Are you acquainted with the circulation managers of the other three newspapers?

A. Past and present.

Q. Are you acquainted with them?

A. Yes, sir.

Q. Mr. Casaday, are you familiar with the street vendor [332] operation of the San Francisco Chronicle, the San Francisco Call-Bulletin, and the San Francisco News?

A. I am more familiar with the operations of the Chronicle than I am with the evening papers.

(Testimony of J. D. Casaday.)

Q. Well, now, confining yourself to the Chronicle, can you say of your own knowledge that the operation on the Chronicle, in so far as street vendors' sale, is substantially the same as you have testified to for the Examiner?

Mr. Jacobs: Your Honor, I don't think this witness is competent to give a general answer to specific questions which are only within the province and knowledge of the employees of the Chronicle.

The Court: Well, I suppose it might depend on hearsay unless he actually observed the system in operation.

Mr. Fink: Well, I thought I had qualified him. I will withdraw the question for the moment, if your Honor please.

Q. Have you observed the Chronicle's system of news vendor operation in San Francisco?

A. I have.

Q. And I understood you to testify that you had a consolidated position with them on nearly all the corners in San Francisco?

A. You mean by that, Mr. Fink, that one vendor offers both papers for sale?

Q. That is true.

A. That is almost entirely true.

Q. Mr. Casaday, now, repeating the question: From your experience and your own observation, and not hearsay, can you [333] say of your own knowledge that the operation of the Chronicle is substantially the same as that of the San Francisco Examiner?

(Testimony of J. D. Casaday.)

Mr. Jacobs: Same objection, your Honor.

The Court: I will allow the witness to testify to that to the extent of the consolidated operation, because I recall his earlier testimony, to the effect that there is an accounting operation, one on behalf of the other, for a six months period. So, to that extent, he would have sufficient familiarity to describe that operation, but so far as the Chronicle's operations on its own are concerned, I think the witness would not be qualified unless he actually participated in that.

Mr. Fink: Under the ruling of the Court, Mr. Casaday, you may answer the question, I take it.

A. It is almost identical from the time the papers leave the plant. In fact, your Honor, both wholesalers rode on one truck during the war.

Q. That was because of the O.D.T.?

A. The O.D.T. restrictions.

Q. Office of Defense Transportation. That was after the period we are interested in.

Now, Mr. Casaday, just one more question: Do you or any of your subordinates have anything to do with the disciplining of news vendors, whatever that discipline may be? [334]

Mr. Jacobs: The question has been asked and answered at least three times.

Mr. Fink: Not of this witness at all. And it was brought out by your cross-examination.

The Court: Would you read that?

(The reporter read the question.)

(Testimony of J. D. Casaday.)

The Court: I think the question is objectionable, whether they have anything to do. You can ask him whether they did anything.

Mr. Fink: I will change the form of the question.

Q. Do you, Mr. Casaday, or any of your subordinates, take any action in the disciplining of news vendors?

A. Nothing other than cancellation of the contract.

Q. (By Mr. Jacobs): Mr. Casaday, isn't it the practice——

Mr. Fink: I beg your pardon. Wasn't I redirecting?

Mr. Jacobs: I thought you were complete.

Mr. Fink: Go ahead.

Mr. Jacobs: No, no.

Mr. Fink: Go ahead.

The Court: Have you any further questions?

Mr. Fink: No, your Honor.

The Court: All right.

Mr. Jacobs: I thought I understood you to say you had finished, Mr. Fink.

Mr. Fink: Go ahead, Mr. Jacobs. [335]

Recross-Examination

By Mr. Jacobs:

Q. Mr. Casaday, isn't it the practice, and isn't it true that under your contract with the union, there is an employee of the circulation department who deals with the business agent of the union?

A. Let's see if I understand that question correctly, please.

(Testimony of J. D. Casaday.)

Q. I will read the portion of the contract to you if you don't recall it. Are you familiar with that portion of the contract which deals with the appointment or the designation of an employee of the circulation department who is to act as the representative with the business agent of the union?

A. I have told you that and who they were.

Q. Isn't it true when it is brought to that person's attention some deficiency or delinquency of the news vendor, that he communicates that to the business agent of the union?

A. Again, I want to make sure that I understand the question. You want to know that if one of my subordinates, who is in charge of the wholesalers, for instance, receives some notice of a delinquency or a failure of a news vendor to live up to the terms of his contract, if he calls that to the attention of the business manager of the union?

Q. Yes. A. That is correct.

Q. Don't you know of your own knowledge that normally the union member is disciplined by the union? A. By the union. [336]

Q. Following such communication?

A. That is correct.

Mr. Jacobs: No further questions.

The Court: All right. That is all. You have some more questions?

Mr. Fink: No, your Honor.

The Court: That is all, sir.

Mr. Fink: If your Honor please, may I ask the Court to read Section 12 of the 1937 contract? The reason I raise the issue at this time is because of the interrogation on racks by counsel in cross-examination. The import of his questions would indicate, although I do not know, of course, but would indicate that counsel has never read Section 12 of the 1937 contract.

The Court: Well, who is the next witness now?

Mr. Fink: If your Honor please, I have in court an Examiner wholesaler. I have in court a representative of the San Francisco Call-Bulletin. I have in court the circulation manager and another employee of the San Francisco Examiner. I have in court several members of the News Vendors Union. I am prepared to proceed to put those witnesses on the stand one by one.

I now represent to the Court that if I put these separate witnesses on the stand that they will testify to substantially all of the facts already covered by Messrs. Bitler, Parrish and Casaday. I represent to the Court that there [337] will be no substantial variation, and if there is any variation, it will be only as to minor details in no way affecting the main issue, and I now tender to the Government a stipulation to the general effect that if I place the witnesses upon the stand for the other papers as indicated by me, their testimony will be substantially the same as that already given, by the witnesses called.

Mr. Jacobs: May it please the Court, in response to the tender, I have no desire to prolong this trial

any longer—one moment more than is absolutely necessary, and I suggested at the opening of today's proceedings that we would give serious consideration to such a tender if members of the Chronicle, employees of the Chronicle, were called. I made that suggestion because I can't tell counsel for the plaintiffs how to put in their case. That suggestion was not taken up.

Maybe Mr. Fink doesn't think there is any substantial difference, but I know from my own knowledge that there are differences in operation, and certainly in the case of the Chronicle, and therefore I cannot accept the tender.

Mr. Fink: Well, now, your Honor, of course that is a direct refusal of the stipulation, and we can do no more; but I don't want to be charged by the Court with producing purely cumulative witnesses.

The Court: If you consider the evidence is cumulative, [338] there is no occasion for you putting it on.

Mr. Fink: If your Honor please, I must, because there are other papers involved. You see, these rulings——

The Court: There is only the Chronicle and Examiner involved in this.

Mr. Fink: No, your Honor. The Chronicle, the Examiner and the Call-Bulletin. There are three papers involved here. There are two others to be heard. The rulings in the three cases are identical; that is, the rulings from the Treasury Department are identical. I am perfectly willing to proceed, I

am prepared to proceed, but I represent to you seriously that you are going to be irritated by a lot of cumulative testimony that there will be no substantial——

The Court: I hope I haven't given the impression that I am going to be irritated by it. I just feel in the case of this kind that the case should have been presented in great part on a statement of facts, saving the time of Court and counsel, and the witness and everyone else concerned, that is all. I don't see any occasion for making a cause celebre of this case. It just involves a question of whether the street vendors are employees in fact, whether they come within the purview of the Security Act. There is no need of making a battle between the Government counsel and the newspaper publishers over it.

While every cause is important to those involved, it isn't [339] that important.

Has the Government any contrary testimony to offer in connection with the matter of the Examiner case? Oh, well, perhaps I should ask, have you any further testimony that you consider essential to the Examiner case?

Mr. Fink: I have one other witness here, a wholesaler, prepared to testify.

The Court: That would only be cumulative as to the Examiner?

Mr. Fink: Absolutely.

The Court: Maybe it might be well to direct the order of proof. Does the Government wish to

put on any testimony with respect to the claim of the Examiner in this consolidated action?

Mr. Jacobs: You mean in the defendant's case?

The Court: As a part of the defendant's case, yes. I am not urging you to either present or not to present any testimony. It just occurred to me, just in the interest of fairness and justice, that what is really involved in this case is an interpretation of the acts and the conduct and the agreements of the parties, and that there can't be a great deal of dispute as to these more or less notorious facts that are concerned with the transactions in question, and both sides should have ample opportunity to either brief or argue in any way they want, the interpretation to be put upon those [340] facts. My only complaint with this case is not with the issue particularly, but that I think it can be presented much better by way of argument than by taking up all the time, the hours of the Court's time, to describe how newspapers are sold on the streets in San Francisco. That could have been done in a written statement or by stipulation that could have been prepared before trial, and there can't be very much question about it. That is the only point that I have. I therefore don't want you to think that I am urging that you either do or do not present any evidence, Mr. Jacobs. I want to hear from you and your opponent fully on the important part or question at issue, and that is, what is the interpretation to be put upon the acts and conduct of the parties in order to show what their status is?

Mr. Jacobs: That is why I, in all good faith, suggested that they put on employees of the Chronicle.

The Court: Well, will that make very much substantial difference so far as the ultimate question is involved?

Mr. Jacobs: May I make a suggestion: that an appropriate employee of the Chronicle be called and that the Government be allowed to cross-examine him with respect to their practice?

The Court: Would you have any objection to that?

Mr. Fink: None whatever, your Honor.

The Court: All right. [341]

Mr. Jacobs: It is understood this is plaintiff's witness.

Mr. Fink: Well, now, after all, I am tendering a stipulation with the idea——

The Court: You can put him on as an adverse witness, under the rules, in your case; you are not bound by his testimony under the rule, so that wouldn't make any difference.

Mr. Jacobs: With that understanding, we will call Mr. Nichols.

Mr. Fink: Your Honor, may I suggest that we take a recess at this time?

The Court: Very well. We will take the afternoon recess, at this time.

(Recess.)

Mr. Jacobs: Do I understand correctly that plaintiff has not rested, and that this witness is simply being called out of order?

The Court: I understood from Mr. Fink that he has concluded his evidence so far as the Examiner is concerned. Is that right?

Mr. Fink: With one exception, your Honor. I told the Court that I had a wholesaler here, but if I put him on the stand his testimony would be entirely cumulative. I have a wholesaler in court prepared to testify. I am prepared to examine him, but his testimony will be entirely cumulative. [342]

The Court: Then there is no point in putting him on.

Mr. Fink: As I see it, your Honor, that is true.

Mr. Jacobs: If it is cumulative, there is nothing required of me.

Mr. Fink: Your Honor, the point to this colloquy is this: If I do not get a stipulation from counsel, then I assume it will be necessary for me to put these witnesses on the stand for a limited examination, anyway. I assume that counsel has in the back of his mind, although I don't know—I assume that he is going to contend that there is variation between the operation of the three newspapers I am representing here. If that be true, I will have to call the witnesses, which I dislike doing.

The Court: Well, is there any way that you gentlemen can suggest that the matter be shortened?

Mr. Jacobs: May it please the Court, let's clarify this one thing. As I understand it, this wholesaler of the Examiner would only supplement or repeat what Mr. Casaday or Mr. Parrish has said.

The Court: That is what Mr. Fink has said.

Mr. Jacobs: There is no occasion for any stipulation. I am not going to stipulate that that would be cumulative evidence. There is no necessity for any such stipulation as to the Examiner. Mr. Fink has stated that he has evidence, that he could call another witness who will repeat the same [343] testimony. He can use his own judgment as to whether he wants to put that cumulative testimony in as to the Examiner.

The Court: If the testimony is to be purely cumulative, I will say, then, that the Court would say that it doesn't want to hear the testimony of witnesses on cumulative matters, and that if any question were raised, if, in the course of the defense, the weight of the testimony were attacked, that the Court would then permit counsel to put his witness on to testify cumulatively. With that understanding, is it satisfactory?

Mr. Fink: With that understanding, I will accede to counsel's request.

Mr. Nichols, will you take the stand, please?

VERN L. NICHOLS

called as a witness for the plaintiffs; sworn.

The Clerk: State your name to the Court?

A. Vern L. Nichols.

Direct Examination

By Mr. Fink:

Q. Mr. Nichols, what is your occupation?

A. I am circulation office manager for the *San Francisco Chronicle*.

Q. How long have you been such?

A. Since about the first part of 1939.

Q. Mr. Nichols, have you been continuously in court since this case started?

A. Yes, I have, sir. [344]

Q. In so far as any part of the operation comes under your supervision in the *Chronicle*, would your testimony be substantially similar to that already given?

Mr. Jacobs: Just a moment, Mr. Nichols, unless we know what testimony——

Mr. Fink: After he answers that, I am going to turn him over to you and you can cross examine him.

Mr. Jacobs: May the record show an objection to the form of that question?

The Court: If the Court may make a suggestion—I am only doing it in the interest of time in a matter that may or may not be controversial; I don't want to affect the rights of either side—suppose you ask the question whether or not the

(Testimony of Vern L. Nichols.)

the manner in which the Chronicle handles its relation with the news corner vendors is substantially the same as that testified to by the witnesses on behalf of the Examiner. If he answers the question in the affirmative, then let counsel go into it.

Mr. Fink: I will adopt the question of the Court as my own.

Q. Do you remember the question, Mr. Nichols?

A. Yes, I do.

Q. Will you answer it please?

A. I would say yes, in most all the testimony that has been given that the routine in relation to the carrying on is about the same as has been [345] mentioned in the other testimony.

Mr. Fink: You may cross-examine.

Cross-Examination

By Mr. Jacobs:

Q. Mr. Nichols, does the Chronicle keep a record of the vendors to whom they paid a bonus or guaranty?

A. Yes, we keep a record week by week.

Q. How far back do your records go? Or to refresh your recollection, I recall that they go back to 1943, is that correct?

A. Part of our records, yes.

Mr. Fink: To 1943? Is that what you said?

Q. (By Mr. Jacobs): Is that correct?

A. Part of our records, yes. I wouldn't say all of them were complete.

(Testimony of Vern L. Nichols.)

Q. No, but there are some records as far back as March, 1943, is that correct?

A. Yes, there are some.

Q. Before that date have they been destroyed?

A. Yes.

Q. For business purposes? A. Yes.

Q. They were no longer useful.

A. No use for them.

Q. Can you, through any other representative of the Chronicle, obtain for me the record, in order to shorten this proceeding, the record of the amount of guaranties or bonuses paid to vendors of the Chronicle for the weeks March 21st, March 28th, April 4th, and April 18th, 1943?

Mr. Fink: If your Honor please, that is objected to as [346] being without the period under investigation here. We are investigating a period that begins August 31, 1937, or April 1, 1937, and that ends in 1940.

Mr. Jacobs: May it please the Court, I have established by this witness that there were no records available during the taxable period. I will say, though, it is quite relevant, in the absence of such records, to show how they operated from the earliest time that they have records under the contracts, which are substantially the same, and which the plaintiffs contend are substantially the same.

The Court: As a preliminary matter, I think you could go into that in order to ascertain whether or not in the period in issue they similarly conducted themselves. I would allow it for that purpose.

(Testimony of Vern L. Nichols.)

Q. (By Mr. Jacobs): Were similar records kept during the period April 1, 1937, through 1940?

A. No, I don't have the records complete, Mr. Jacobs. We came across some records, like corner complaints, and some correspondence, I believe, but I have no records of the exact amount paid out to vendors during '43 or any month such as that——

Q. You have no record now, but were such records kept? A. Yes, sir.

Q. Were the same sort of records kept for 1943 as were kept from 1937 to 1940?

A. Very similar, yes. They [347] have been changed slightly.

Q. Again I ask, Mr. Nichols, can you obtain the record of payments on guaranties during the four weeks I mentioned?

A. No, I cannot, Mr. Jacobs. I don't have those records.

Q. Not in the courtroom. Can you obtain them through some employee?

A. No, I have no amounts that were paid to vendors during 1943 for those weeks you mentioned.

Q. Mr. Nichols, did you receive a subpoena to produce the corner guaranties—amounts paid on corner guaranties?

A. Yes, the records for '37, '38, '39 and '40, but those records are not available.

Q. Did the subpoena you received specify those years? Mr. Nichols, I read you what purports to be a copy of the memorandum of subpoena directed to you: "Bring with you all reports, records and

(Testimony of Vern L. Nichols.)

forms of reports and records, and other writings relative to the amount of sales of the San Francisco Chronicle by street vendors by reason of contracts with the news vendors, and all records, reports and writings relative to the agreement, conditions and such other amounts as may have been paid to said news vendors."

A. The sale to the vendors is shown up in the audit reports during that period.

Q. This subpoena directed you to bring the records of the amount paid for corner guaranties.

A. I don't have any records. [348]

Mr. Fink: Just a moment. I object to that upon the ground that it is argumentative, if your Honor please.

The Court: The witness has answered that he has no such records.

Mr. Fink: That is right.

Q. (By Mr. Jacobs): Mr. Nichols, do you recall my visit to your office? A. Yes, sir.

Q. Do you recall showing me the records of corner guaranties? A. Not for 1943.

Q. What was the earliest period for which you showed me the records?

A. I think I just showed you some for the current month of March.

Q. How far back? You said a moment ago your records go back as far as 1943.

A. In some instances, yes. Our records are not complete in its entirety of any dealings with the news vendors.

(Testimony of Vern L. Nichols.)

Q. Will you produce them——

Mr. Jacobs: I ask the Court, if necessary, to direct the witness to produce them for the earliest period you have.

A. I will look again, Mr. Jacobs, and see if I can find records extending back that far. But may I answer it this way, your Honor, by saying that after a year we feel that they are of no value to us and we can't—if we stored everything pertaining to news vendors we would have to hire a hall to store them in, it takes up such a great volume of space. [349]

Q. Didn't you show me a complete box of records on vendors' corner guaranties?

A. Yes, I believe I did.

Q. Where is that box?

A. It is still down there. I don't—if that was 1943, then I have made an error, for which I am sorry.

Q. That may be. I don't say you misstated it. Will you get that box, please, or have somebody get it for you? A. Yes.

Q. Not at this time. I want to ask you a few more questions.

Mr. Jacobs: Will you mark these for identification, please?

The Clerk: These will be marked Defendant's Exhibits T, U, V and W. T is 1937, U 1938, V 1939 and W 1940.

Q. (By Mr. Jacobs): Mr. Nichols, I show you Defendant's Exhibits T, U, V and W for Identifi-

(Testimony of Vern L. Nichols.)

cation, and ask you if you recognize them, and if you recognize them, state what they are?

A. Yes, sir, these are the Audit Bureau of Circulation Annual Reports covering the years 1937, '38, '39 and '40.

The Court: That is for the San Francisco Chronicle?

A. San Francisco Chronicle; I am sorry.

Mr. Jacobs: They are offered in evidence.

The Court: All right. Let them be admitted.

Mr. Fink: I present the formal objection, your Honor, that they are incompetent, immaterial and irrelevant. You have already ruled on it. [350]

The Court: I presume that they are offered for the same purposes as similar documents in the case of the Examiner. Therefore, they will be admitted for the same purpose.

(Thereupon the documents referred to were marked Defendant's Exhibits T, U, V and W respectively, in evidence.)

Mr. Jacobs: Will you mark this for identification, please?

The Clerk: Defendant's Exhibit X for identification.

Q. (By Mr. Jacobs): I show you Defendant's Exhibit X for Identification, and ask you if you recognize it, and if you do, state what it is?

A. This is a report showing the street sales of the San Francisco Chronicle.

(Testimony of Vern L. Nichols.)

Q. Was this form or a form containing the same information in use during the years 1937 to 1940?

A. It may have been slightly changed; it is practically the same.

Q. Is it true that on this form is recorded the amount delivered on each edition to each district?

A. No, not—It was set up for that purpose, however, but they don't always use the breakdown on each edition; it is generally the total amount of papers they received in one evening—one day's issue, rather.

Q. Is that the practice now or was that the practice in 1937?

A. This is the practice now and was then also.

Mr. Jacobs: I offer defendant's Exhibit X in evidence.

(Thereupon the document referred to was marked Defendant's [351] Exhibit X in evidence.)

Mr. Jacobs: Mark that for identification, please.

The Clerk: The last exhibit is marked Defendant's Exhibit Y for Identification.

Mr. Jacobs: I show you Defendant's Exhibit Y for Identification, and ask you if you recognize it?

A. Yes.

Q. Will you state what it is?

A. Well, this is just a work sheet that the wholesalers use in making their route delivery to vendors and stores, et cetera.

(Testimony of Vern L. Nichols.)

Q. On this form is recorded the amount delivered on each edition to each corner by the wholesaler in his district, is that correct?

A. No, that isn't used for that purpose now, Mr. Jacobs.

Q. Was this or a similar form in use in 1937 to 1940?

A. This form has never actually been turned in to the office for any basic reports. It is used more as a convenience for the wholesaler to use in making his own distribution to the stores and news vendors.

Q. Was this form or a similar form in use in 1937 to 1940? A. Yes.

Q. On that form does he record the amount delivered of each edition to each vendor in his district?

A. I think he does, yes.

Mr. Jacobs: Defendant's Exhibit Y is offered in evidence. [352]

Mr. Fink: No objection.

The Court: It will be admitted.

(Thereupon the document referred to was marked Defendant's Exhibit Y in evidence.)

Q. (By Mr. Jacobs): Turning your attention to Defendant's Exhibit X, will you tell me who accomplished or filled out this form?

A. This is filled out by the street sales supervisor at the end of the day after his sales are all in, for one day's issue on the p.m. street sales.

(Testimony of Vern L. Nichols.)

Q. Where does he obtain the information from which he makes up this report?

A. From the wholesalers.

Q. Do they have a written report they submit to him at the end of each day's sales?

A. Each wholesaler makes up his own report and turns it in to the street sales supervisor, yes.

Q. Is there a regular form for such report?

A. Well, he may use that——

Mr. Fink: Sales slip; it is already in evidence.

Mr. Jacobs: No; let the witness answer the question, Mr. Fink.

A. That is part of it, Mr. Fink. There are two sources, really: that exhibit you had there a moment ago—I forget what you labeled it—he may use that for the total number of papers he has distributed during the night; and the rest [353] of his information in his actual street sales he gets from his corner tags from the vendors, or sales slips, as they are called in the exhibit, and then they will be recorded by the street supervisor to get the total street sales, which includes vendors, newsboys not under the union, and rack sales if it is morning sales.

Q. I take it that he also uses Defendant's Exhibit Y for some of his information?

A. Yes, I imagine he does.

Q. Let us digress just a moment, Mr. Nichols. During the years 1937 to 1940, were news vendors employed to sell the Chronicle in the morning, or is it—Just answer that question.

(Testimony of Vern L. Nichols.)

Mr. Fink: Objected to as to form. The news vendors were not employed at all.

Mr. Jacobs: Engaged, if you like.

A. I didn't quite get your question, Mr. Jacobs.

Q. As I understand it, the principal sales of the Chronicle in the years 1937 to 1940 were on the right side, is it not true?

A. Yes, the larger sale was on the night side.

Q. And news vendors were engaged to sell on the night side? A. Yes, sir.

Q. During the years 1937 to '40 how many news vendors, if any, were engaged on the day side of the Chronicle?

A. I don't know, Mr. Jacobs. I don't recall exactly how many [354] were on the morning side.

Q. Isn't it true that very few vendors are engaged to sell the Chronicle on the day side?

A. There are fewer on the morning side, yes.

Q. Isn't it true that the bulk of the sales on the morning side come through the coin racks?

A. At the present time.

Q. Likewise wasn't that true in 1940?

A. I don't recall; I doubt it very much.

Q. Do you think it was different in 1940 than it is today?

A. Yes. I think it was different then.

Q. In what respect?

A. The circulation has gained considerably since that period.

(Testimony of Vern L. Nichols.)

Q. I know, but in sales on the day side, is that accomplished in a different manner than it was in 1940?

A. No, I think the same methods are used now; practically the same.

Q. I ask you again, isn't it true today that the bulk of sales in the morning of the Chronicle is accomplished on the streets by coin racks and not by news vendors? A. Yes, that is true.

Q. That was true in 1940, wasn't it?

A. I don't recall without looking up the records, Mr. Jacobs, although I would say that it would be higher, yes.

Mr. Jacobs: Mark this for identification, please.

The Clerk: Defendant's Z for Identification.

Mr. Jacobs: I show you Defendant's Exhibit Z for identification and ask you if you recognize it, and if so, state what it is?

A. Yes, this is a report of the a.m. street sales. That is the morning side.

The Court: You mean it is the form on which he makes his report?

A. Yes.

Mr. Jacobs: Defendant's Exhibit Z is offered in evidence.

(Thereupon the document referred to was marked Defendant's Exhibit Z in evidence.)

Q. (By Mr. Jacobs): Who makes out that form?

A. That form is completed by the morning street sales supervisor.

(Testimony of Vern L. Nichols.)

Mr. Jacobs: Mark that for identification, please.

The Clerk: Defendant's Exhibit AA for Identification.

Q. (By Mr. Jacobs): I show you defendant's Exhibit AA for Identification, and ask you if you recognize it?

A. Yes, that is another form used by the wholesalers in making their distribution.

Q. Was that form or a similar one used from 1937 to 1940?

A. No, I don't think it was in effect at that time, Mr. Jacobs. I don't know how long this has been in effect. It has been probably three or four years.

Q. Was there a similar one in use in 1940?

A. No, I think that was one—the large size one in that [356] exhibit was used for that purpose.

Mr. Jacobs: Will you staple these together and mark them for identification, please?

The Clerk: Marked AB, Defendant's, for Identification.

Mr. Jacobs: I show you Defendant's Exhibit AB for Identification, which consists of seven pages stapled together, and ask you if you recognize them?

A. Yes, I do, Mr. Jacobs.

Q. Will you state what it is?

A. This is a form used by the San Francisco Chronicle in listing the amounts of guaranty due the vendors weekly.

Mr. Jacobs: Government's Exhibit AB is offered in evidence.

The Court: Very well.

(Testimony of Vern L. Nichols.)

Mr. Fink: I don't think I have any objection to the form, but I do want, before it is introduced in evidence, to ask that the Court request counsel to identify it as to time. [357]

Q. This form, or one similar was used in the years 1937 to 1940?

A. I don't know about 1937, Mr. Jacobs.

Q. At any time?

A. We had a mimeographed form when we first started, listing the amounts of profits by the vendors and the amounts of guarantees that was due them, but it is practically the same except it is now printed and lists the corners on the night side and the morning side.

Q. Your answer is that some time during 1937 to 1940 this form or one similar to it was in use.

A. Yes, to the best of my recollection.

Mr. Jacobs: I renew the offer.

The Court: It may be admitted.

(The document referred to was admitted in evidence and marked Defendant's Exhibit A-B.)

(A document was marked Defendant's A-C for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit A-C for identification, and ask you what it is?

A. This is a form used by the Chronicle called a corner complaint.

Q. Was this form or one similar to it in use at any time in 1937 to 1940?

(Testimony of Vern L. Nichols.)

A. I don't recall, Mr. Jacobs. That is not under my jurisdiction, really. We have got several copies around. I had some in the file, but I have no use for them personally.

Q. You don't know when this form started in use?
A. No, I don't. [358]

Q. Does it go back as far as you remember?

A. I don't recall exactly. I just came across it not so long ago. They file them in a specific place, because they have been going to another place such as the circulation manager or his assistants, who was handling street sales.

Q. Mr. Nicholes, are you familiar with the relations between the wholesalers and their supervisors?

A. Somewhat. That is not in my department, however.

Mr. Jacobs: May it please the Court, I want to state this for the record: I have endeavored to shorten this proceeding. I have asked Mr. Nicholes at the stand what his acquaintanceship is with the paper.

The Court: What?

Mr. Jacobs: What his familiarity with the practice of the paper is. He states he is the office circulation manager.

Mr. Fink: The office circulation manager? He has not so stated.

Mr. Jacobs: I beg your pardon.

Q. State your function again.

A. Circulation office manager. There is a difference, however.

(Testimony of Vern L. Nichols.)

Mr. Jacobs: I have asked him also whether anybody else is familiar with that, and he points to the credit circulation manager who was not here during the taxable period. He also stated that nobody else here has that familiarity. This witness has not that acquaintanceship. I don't see how I [359] could pursue the line of examination. I thought I could get this stuff in evidence, based on the testimony of this witness. He repudiates the knowledge.

The Court: Does this arise because of this particular form?

Mr. Jacobs: Yes, your Honor.

The Court: Is there anything else except this form?

Mr. Jacobs: I don't know at this time. I want to pursue the examination further.

Mr. Fink: I have not objected to any forms, though I asked you to clear up a date. I have not objected to any forms.

Mr. Jacobs: I offer this in evidence. But, I will just state, your Honor, that this witness fails to establish clearly, in my mind whether this form I just put in evidence was used over the taxable period. His memory is hazy utterly about how far this form goes.

The Court: We cannot help that.

Mr. Jacobs: If it please the Court, I want to complete the record as to The Chronicle. There is nobody here from The Chronicle who is familiar with the period.

The Court: Well, if he is not familiar with the period, what are we going to do about it?

(Testimony of Vern L. Nichols.)

Q. (By Mr. Jacobs): Do you know, Mr. Nichols, how this form was used? [360]

A. I may have some general knowledge, Mr. Jacobs, but inasmuch as it is not my affair, I don't feel I should answer it because I might not be giving the truth.

The Court: Who knows about it? Whose function is it?

A. Mr. Gilroy used to know during his period, being circulation manager, and one of the street sales supervisors handles it now, together with Mr. Forbes, the City Circulation manager.

Q. How about the period 1937 to 1940?

A. I don't know who handled it then. I assume Mr. Gilroy did.

Q. (By Mr. Jacobs): Mr. Gilroy is the circulation manager, and he is out of town, I am told by Mr. Nicholes. In view of Mr. Fink's offer to prove, I don't see how we can prove it. I am trying to save the time of the Court to get in the evidence. I am doing my level best, but I want the Court to appreciate that.

The Court: What is the importance of this form?

Mr. Jacobs: This form, as I understand it, is commonly employed, is regularly employed, in the records kept in the regular course of business by the wholesalers of complaints filed by the wholesalers of delinquencies and deficiencies of the vendors.

The Court: Maybe Mr. Fink would testify they made complaints on this form or another form.

(Testimony of VERN L. NICHOLS.)

Mr. Fink: If your Honor please, that is the testimony right there. Mr. Casaday so testified that they are turned [361] in to the office. There is no dispute; I have not objected to one of these forms.

The Court: Apparently this may go in as a form that was used, or some form substantially similar to it, reporting complaints as to the conduct of the vendors during the period.

Mr. Fink: Your Honor, I will verify that, and state the fact to the Court whatever it is.

Mr. Jacobs: Will you mark these folders for identification, please.

Mr. Fink: Your Honor, let me say this: Mr. Gilroy has been in constant attendance on the court up until today. A conference of vital importance to all newspapers is going on, a conference on newsprint. He is attending that. That is the reason he is not here.

(The folders were marked Defendant's Exhibit A-D and A-E for identification.)

Q. (By Mr. Jacobs): Mr. Nicholes, I show you Defendant's Exhibits A-D and A-E for identification, and ask you if you recognize them?

A. Yes, I do.

Q. What are they?

A. These are files, they are the corner complaints, the third copy of which came along with the other data in connection with the news vendors' guarantee.

(Testimony of Vern L. Nichols.)

Q. These records are part of the regular business records of The Chronicle? A. Yes. [362]

Q. Do you know of your own knowledge, Mr. Nicholes, that the wholesalers filled out this form? Is that correct? A. Yes.

Q. Filled it out singly or in triplicate?

A. I think it was made in triplicate. I would not say for sure, because——

Q. That is not your department?

A. That is not my department.

Mr. Jacobs: The Government offers them in evidence, Defendant's Exhibits A-d and A-e.

The Court: Don't offer them in evidence. I am not going to read them, Counsel, for a determination of this case. Make a statement of what is in there and Counsel may agree.

Mr. Jacobs: May I read what I think is an illustrative one. These are typical corner complaints.

The Court: Just state the substance of what is in the file. Probably they won't dispute it. Why encumber the record with matters of that kind?

Mr. Jacobs: If it please the Court, to complete the record, these complaints state the actual working relationship between the wholesaler and the vendor. Now each one singly, there are a number of different types of complaints, which can only be appreciated by the over-all picture. No one complaint gives the Court the actual day to day relationship, but taken all along they do indicate to the Court, and do establish just how the wholesaler deals with the vendor, and [363] this is the best evidence, the day to day record.

(Testimony of Vern L. Nichols.)

The Court: What is the substance of the day to day records? What do they show?

Mr. Fink: May we have first the period covered? I have not even seen these, if it please your Honor. May we have the period identified?

Mr. Jacobs: 1942 and 1943.

Q. Mr. Nicholes, have you such records prior to this time?

A. No, that is all I could locate, Mr. Jacobs, as far back as that period there.

Mr. Jacobs: These are the only available records of the working relationship. I think rather than have this witness testify what the wholesalers and the vendors, here is the record, made day by day by the wholesalers.

The Court: These are complaints the wholesaler files with the newspaper as to what he finds in the way of fault with the way the vendors are operating?

Mr. Jacobs: Yes, your Honor.

The Court: That is the record of such complaints kept?

Mr. Jacobs: The nature of the complaints is what I am getting at, your Honor. For instance, it shows that the wholesalers normally tells the drunken vendor that he checks him in before the end of the sales period and sends him home. We think that is pertinent. Let me give your Honor some idea.

The Court: All right. [364]

(Testimony of Vern L. Nichols.)

Mr. Jacobs: A complaint of May 28, 1943, submitted by a wholesaler named Ford with reference to a vendor at Fifth and Mission, time 11:45. "When I drove up with the last edition at 4:00 p.m., he only had—" I wanted to give him \$10, he refused to accept, so I checked him in and sent the vendor home."

Mr. Fink: The trouble was he wanted to leave the corner before the regular time.

Mr. Jacobs: There is a demonstration of what the wholesaler did, said "You are through for the day"—"He refused to accept my order."

Mr. Fink: On the contrary, the report shows the vendor wanted to get out himself.

Mr. Linn: May I suggest, if your Honor does not want to read them, that you leave them in the envelope. In the Hearst case these matters were considered very material.

The Court: What case?

Mr. Linn: The National Labor Relations vs. Hearst. Just leave them in the records.

The Court: Well, they are part of the records of The Chronicle, are they?

Mr. Linn: Yes. If that is not clear, isn't that agreed to by stipulation?

The Court: These are taken from your records you produced them? [365]

The Witness: Yes.

The Court: All right. Put them in evidence.

Mr. Fink: If your Honor please, before you permit them in evidence, I want to make a formal

(Testimony of Vern L. Nichols.)

objection. I object to them on the ground that they are incompetent, irrelevant and immaterial, because it appears by the statement of counsel that they are for the period of 1943. Did you say 1942 and 1943, or just 1943?

Mr. Jacobs: 1942 and 1943.

Mr. Fink: 1942 and 1943, and have no bearing on what may have happened in the period of 1937 to 1940.

Mr. Jacobs: I ask the Court to note that the contracts for this period are in evidence. Again I say there is no substantial variation between the contracts for the taxable period.

The Court: There may be some evidence that similar procedure was followed. I will let the files be marked in evidence, and Counsel can call my attention, if it is part of the record of *The Chronicle*, I will allow it in evidence and Counsel can call my attention to such portions as he deems pertinent.

(The complaint files were marked Defendant's Exhibits Nos. A-D and A-E in evidence.)

Mr. Jacobs: No further questions. [366]

Redirect Examination

Mr. Fink: I think I have one other question that suggested itself to me. Have you got Exhibit A-B, Mr. Clerk, please.

Mr. Jacobs: I understand, your Honor, that if I want to recall a witness to identify the corner guarantee file which he was asked to produce, I may?

(Testimony of Vern L. Nichols.)

The Court: Well, you may be able to do that out of court. Just present it. I don't want to take up unnecessary time on the production of records. You will be given an opportunity to present it.

Q. (By Mr. Fink): Mr. Nicholes, I hand you Defendant's Exhibit A-B. Do I understand you correctly to testify that that form is the successor to a mimeographed form? A. Yes.

Q. And was the mimeographed form laid out on the same plan as that form was laid out?

A. Well, no. It was very incomplete. It was just ruled off more than anything else, to show the corners and the profits and the vendors.

Q. Mr. Nicholes, is it part of your duty in The Chronicle to keep track of the changes in the contracts of the vendors? A. No, it is not.

Mr. Fink: That is all.

The Court: That is all.

The Witness: I might say, your Honor, I did not mean [367] to be evasive a minute ago, in regard to those folders. The information Mr. Jacobs talked to me about, I completely overlooked that 1943. I did not mean to be evasive, just nervous so to speak. I did not check them on that subject, but I can supply that information.

Mr. Jacobs: There is no suggestion of bad faith.

(Witness excused.)

The Court: Have you a similar witness for the Call-Bulletin?

Mr. Fink: I have a similar witness. Mr. Winchester, will you take the stand, please.

E. R. WINCHESTER

called as a witness on behalf of the Plaintiffs;
sworn.

The Clerk: State your name to the Court, please.

A. E. R. Winchester.

Direct Examination

By Mr. Fink:

Q. What is your occupation, Mr. Winchester?

A. Circulation Manager for the San Francisco
Call-Bulletin.

Q. How long have you been such?

A. In that capacity for about three years.

Q. Were you with the San Francisco Call-Bulletin prior to that time?

A. I have been since 1929.

Q. What was your title prior to three years ago.

A. Assistant Circulation Manager.

Q. And you were such for how long?

A. Approximately four years. [368]

Q. The Circulation Manager of the San Francisco Call-Bulletin was named Pressly Mallory, is that correct?

A. That is correct.

Q. He has passed away. He died approximately three years ago?

A. Yes.

Q. Mr. Winchester, have you been in court continuously since the opening of this case?

A. I have.

Q. Did you hear the testimony of Mr. Parrish?

A. I did.

Q. And of Mr. Casaday? A. I did.

(Testimony of E. Winchester.)

Q. Does the San Francisco Call-Bulletin operate its street vendor sales in approximately the same manner as that described by Mr. Parrish and Mr. Casaday? A. They do.

Mr. Fink: Take the witness.

Cross-Examination

By Mr. Jacobs:

Q. You heard also the testimony of Mr. Nicholes? A. That is right.

Q. Would you say the Call-Bulletin maintains similar records, carries on operations similar to what Mr. Nicholes testified?

A. With some variation, Mr. Jacobs, but basically the same.

Q. Mr. Winchester, during the years 1937 to 1940 approximately how many corners or locations was the Call-Bulletin sold at by the Union street news vendors? A. Oh, roughly, 200 to 225.

Q. And do you know approximately on how many corners the sales [369] were insufficient to meet the guaranteed minimum under the Union contract?

A. Probably 25%, maybe a little in excess of that.

Mr. Jacobs: That is all.

Mr. Fink: That is all.

(Witness excused.)

Mr. Fink: Mr. McGarry, will you take the stand, please?

The Court: Still another paper?

Mr. Fink: No, I wanted to present everybody, your Honor. This is the Circulation Manager of the San Francisco Chronicle.

The Court: Well, do you need him?

Mr. Fink: I just wanted to ask him the same questions, because if you recall Mr. Nicholes qualified his testimony by saying he was the only supervisor of the office circulation, something of that sort.

FRANK R. MCGARRY

a witness called for the plaintiff; sworn.

The Clerk: State your name to the Court, please.

A. Frank R. McGarry.

Direct Examination

By Mr. Fink:

Q. Mr. McGarry, what is your occupation?

A. Circulation Manager of the San Francisco Chronicle.

Q. How long have you been such?

A. Since October, 1944.

Q. How long have you been with the San Francisco Chronicle? A. About fifteen years. [370]

Q. And prior to becoming circulation manager, what was your title?

A. I was on the road, a road man.

Q. That took you out of San Francisco?

A. Yes, entirely.

(Testimony of Frank R. McGarry.)

Q. Mr. McGarry, have you been in continuous attendance upon the court since this case opened?

A. I have.

Q. Did you hear the testimony of Mr. Parrish and Mr. Casaday? A. I did.

Q. Does the San Francisco Chronicle operate its street vendor sale in substantially the same manner as described in the testimony of those two gentlemen? A. I think exactly the same.

Mr. Fink: Take the witness.

Cross-Examination

By Mr. Jacobs:

Q. Mr. McGarry, you did not have anything to do with street vendors in the years 1937 to 1940, did you? A. No.

Q. Your answer to Mr. Fink's questions only applies to the present time, is that right?

A. Yes, sir.

Mr. Jacobs: That is all.

Redirect Examination

By Mr. Fink:

Q. By the way, you inherited a system when you became circulation manager, did you not?

A. Yes.

Q. You have operated that system exactly as it was before, have you? A. Yes.

Mr. Fink: That is all.

(Witness excused.) [371]

Mr. Fink: Now, if your Honor please, I think so far as the plaintiffs are concerned, that we are prepared to rest, with this reservation: I desire to examine the exhibits. I think one or two merely are marked for identification. I would like to offer them in evidence. Otherwise, the plaintiffs rest.

(Plaintiffs rested.)

Mr. Jacobs: At this time, if it please the Court, the Government files a motion for judgment at the close of the plaintiffs' case, for the reason that the plaintiffs have neither pleaded nor proved that the Union street news vendors, the subject of this contract, are independent contractors. I have filed a written motion for judgment which states that in different form, with several specific grounds, but in substance the reason is that the plaintiffs have not proved a cause of action or facts sufficient on which the Court can find for the plaintiffs.

Now, does the Court wish to entertain argument at this time?

The Court: Do you want to submit the case on that, or do you intend to present some evidence?

Mr. Jacobs: Yes, I intend to present some evidence. I don't mind telling your Honor that most of the Government's witnesses are not here. We did not want to take them away from their employment, because we thought the plaintiffs [372] would occupy most of the day.

The Court: How much time do you want for witnesses? I think you mentioned this morning they might be brief.

Mr. Jacobs: I think it might be the subject of stipulation.

Does your Honor want to take the motion under advisement?

The Court: I think that is the best thing to do, don't you, unless you want the case determined on the motion.

Mr. Jacobs: No, I do not.

The Court: I think it is best to take it under advisement at the close of the case. I will do that.

Mr. Jacobs: Now, a good many of the Government's witnesses are news vendors. I might say frankly, the news vendors I have never seen. They were subpoenaed by names furnished by the Union. The principal reason we want to call them is to introduce evidence——

The Government offers in evidence Defendant's Exhibit, what is that?

The Clerk: It has not been marked.

Mr. Jacobs: I will call Mr. Parrish, then.

The Court: Maybe Mr. Fink will agree that it may be offered in evidence.

Is that the one?

Mr. Jacobs: Yes.

The Court: That has been marked for identification. [373]

The Clerk: That has been marked for identification.

Mr. Jacobs: The Defendant offers Defendant's Exhibit N for identification, the income tax return of William Parrish for the year 1940, and before entertaining any objection from Counsel for the

plaintiffs, the purpose of this offer is to show a return by William Parrish as a news vendor for 1940, in which he reports part of his income from the sale of newspapers as a news vendor as wages as coming from The Examiner and The Chronicle.

Mr. Fink: Now, just a minute. Let me see that.

Mr. Jacobs: I would like your Honor to examine the form.

Mr. Fink: If your Honor please, I object to a statement—I hate to characterize a statement as untrue, but that statement is definitely untrue and Counsel knows it to be untrue. Schedule A of the income tax return form reads: “Income received from others, consisting of salaries, wages, fees, commissions, bonuses, and other compensation for personal services.”

Mr. Jacobs: Let me——

Mr. Fink: Pardon me——

The Court: Don’t behave like a couple of children.

Mr. Jacobs: If the Court please, may I have an opportunity to explain the purpose of the offer.

Mr. Linn: I suggest that Mr. Jacobs is not accustomed to Mr. Fink. [374]

The Court: Don’t get excited.

Mr. Fink: I thought I was addressing the Court.

The Court: I should like to try this case without calling you to order. Let me see the form.

Mr. Fink: Well, I would be delighted.

The Court: This is the regular income tax return form?

Mr. Fink: Yes.

Mr. Jacobs: May it please the Court, I want, if I may——

The Court: You are seeking to introduce these income tax returns of various vendors, on the ground that you claim it shows they reported their income from the sales of newspapers as salaries. Is that the point?

Mr. Jacobs: Also, your Honor, that they represented under Schedule A, you notice the name and address of the employer, and it gives the name of the paper in that case as in other cases.

I also want to call your Honor's attention to the purpose of the return. On the first sheet of the return, your Honor, it says: "Individual income and income tax return for gross incomes of not more than \$5000 derived from salaries, wages, dividends interest and annuities (Note: If you are engaged in a profession or business—including from income or you are a member of a partnership or had income or losses from renting or sale of property, use Form 1040)."

In other words, an entirely different form. This is [375] strictly a report of income from salaries and wages, not a business in some form.

The Court: Well, I suppose if they did that, it won't be the first time that people have either been confused by or filed the wrong income tax return. I would not want to decide this case, very frankly, on the basis of how these men reported their income taxes. You may have it in evidence for what is it worth. I say that frankly to you, that they followed the best form they could follow.

Mr. Jacobs: If the Court please, I won't labour the point. This is a representation of the publisher as an employer.

Mr. Fink: This representation of the publisher?

The Court: No, it is what the individual news vendor filed.

Mr. Jacobs: That is right, your Honor. They are the people involved in this case. They are the employees or independent contractors.

The Court: Well, of course, I might attach weight to this if it were the contention that this contract and relationship sought to be initiated by the parties under the contract were fraudulent or colorable, or done for the purpose of causing someone else to act thereon to his or their detriment. Then it would have weight, because it would be an admission that the form the parties went through was [376] designed to deceive someone else. Of course, this is not that kind of case, I gather from what you have stated to me here. If it is claimed, and that is why I asked that question at the beginning of the trial, if the Government contends this is a colorable transaction and entered into for the purpose of evading the effect of the Social Security laws, that is one thing. But, if it was entered into in order to establish a relationship so as not to be within the purview of the Act, of course that is a perfectly lawful, proper thing to do. The only question is, were their acts and the agreement such as would constitute them independent contractor, or employers and employees. Now, if it is under that theory we are proceeding in this case, then the mere

statement of the vendors in filing income tax returns, reporting under this form, I would not think would have much weight, because after all, it is what they did in the performance of the contract and under the terms of the contract, what they agreed to under the contract, that are the determining factors as to their status. Don't you think that is right?

Mr. Jacobs: That is right, your Honor.

The Court: After all, the Government was not interested in this matter; the Government is not trying to make somebody be an employee if he wants to be an independent contractor; it is not trying to make somebody be an independent contractor if he wants to be an employee. The Government occupies a position in which itself sets a very high standard of conduct. [377] It is not forcing anybody to do anything. The only question in the case is whether or not the actual status of the parties is such as by their acts, as evidenced by their actual conduct, and the agreement, is such as to take them within the purview of this statute or not.

Mr. Jacobs: Regardless of the relationship they think they entered into, honestly or otherwise. They may have entered it in all good faith.

The Court: I am not bound, and I don't think either side wants me to decide on the basis of what the parties think they were doing, or state about the relationship, but on their actual relationship.

Mr. Jacobs: In that connection Mr. Fink has stated the intention and belief of the parties, the parties being the publishers and the vendors, was

not that of employer and employee. They will point to Paragraph 1 of the contract which states that in so many words. Now, if that belief is correct, is relevant, if the belief of the parties is relevant, good faith or bad faith belief, if the belief is relevant, then this also is representation of the belief of the relationship of the parties, a return that states they believe in effect, it is a form statement, believe the publishers as their employers.

The Court: Well, you may mark it in evidence as the statement of Mr. Parrish, but subject to Counsel's objection [378] so the record may be very clear on it. I will say to you now, that I don't attach much weight to it in determining the issues presented, so you won't be misled when you submit the case on that. I think the issue is a much more definite one, and has to be determined upon the actual conduct of the parties, their actual agreement, and what they did under the agreement rather than by statements that they may have made that were beyond and outside of the limits of their actual relationship. In other words, I don't think statement would be any different than some statement Mr. Parrish may have made at a teaparty to someone else, that he really was an employee; that the way he felt about it he was an employee, because it would not make any difference. The matter has to be determined on the basis of what the facts disclose to be the actual status of the parties.

Mr. Fink: For the purpose of the record, your Honor, I object to the introduction in evidence of Defendant's Exhibit N, upon the ground that it is

incompetent, irrelevant and immaterial; on the further ground that it is hearsay as concerns the publishers, The San Francisco Chronicle and the Hearst Publications, Inc. And may I gently suggest, your Honor, I think it is a breach of the confidential section of the Income Tax Statute.

The Court: Where did this income tax statement come from? [379]

Mr. Fink: Well, Counsel produced it.

The Court: Maybe Mr. Parrish produced it.

Mr. Jacobs: I produced it; I produced them all.

Mr. Fink: No, Mr. Parrish did not produce it. This gentleman, Counsel here, has a stack of them. I think it is in contravention of the statute.

Mr. Jacobs: What statute?

Mr. Fink: The Income Tax Statute which provides that income tax returns are confidential, and have been for many years last past.

The Court: There may be something in that.

Mr. Jacobs: If it please the Court, this is not a question of a third party going into the Government to ask for a disclosure. John Doe cannot come to the Treasury Department, but this is the Department of Justice taking information furnished by the Treasury Department for the official use of the Government. Furthermore, I know of no statute that prohibits the use of the Department of Justice of anything bearing on the issues here.

The Court: I am not so sure about that, Counsel. I don't think the Department of Justice, statutory provisions or not to the contrary, has a right to dig up this man's income tax statement and offer it in

evidence here in this court on a matter of whether Social Security tax shall be paid. [380]

Mr. Jacobs: I have no desire to disclose it to the world or anybody else.

The Court: I know, but once the income tax statement is offered in evidence, it is disclosed, because the record is in a court proceeding. Anybody interested in the case can come around and find what Mr. Parrish's income is, once it is offered in evidence. I am not sure. I have not had that point submitted to me, but I would feel it is a subject-matter for the exercise of some discretion on the part of the Court.

Mr. Fink: Mr. Parrish is not a party to this action, your Honor, and if his income became a material factor in the case, I would think the Government, by some means, could with good grace offer the return. But to dig up his return because he happens to be an official of the Union, and introduce it in evidence, I say is a violation of the statute.

The Court: It might be possible that a tax return might be admissible by way of impeachment. If you asked him the question: "Is it not the fact that you, yourself, claimed your income or salary from the San Francisco Chronicle" and he denied it, you might be able to produce it for that purpose, to negative the statement. I don't know that you have a right to come in out of the clear sky and offer a man's income tax statement in a case of this kind. After what Counsel has said to me, I would want to see some authority [381] before that would be done.

Mr. Jacobs: Let me state the position, so there will be no question about it, your Honor. This return is offered in the case of Mr. Parrish, not because he is not a party to the suit, but he is a party to the contract here under interpretation, and it is clearly established under the Restatement of Law and other authorities that belief of the nature of the relationship between the parties is evidence of their relationship. That is stated in the Restatement of the Law, the existing law as to what is evidence of the employment relation, the belief of the parties.

The Court: I can understand that, but I think that what we are talking about is, is the right of the Attorney General to come in here and having gotten income tax statements in this way, offer them in evidence in the case.

Mr. Jacobs: I will preserve the confidential nature if there is any. I don't admit there is. I will be glad to read it in evidence without the amounts. There is no question that he is a vendor, the fact that he reported an unspecified amount from the newspaper as his employer, and I will withdraw the offer of the return itself.

The Court: Well, I suppose, subject to the objections that have been made, probably you could get an admission, Counsel would be willing to stipulate that you are prepared to show that a number of news vendors reported in their income [382] tax returns, under the column you have designated, income from sales of newspapers, The Chronicle, The Examiner, or the Bulletin, as the case may be.

Mr. Jacobs: That is perfectly satisfactory to the Government.

The Court: Is that what you are going to bring them all in for?

Mr. Jacobs: After getting a few of them to testify, I will offer a stipulation as to the remaining.

The Court: On this matter?

Mr. Jacobs: Yes.

The Court: Are you able to state in number of returns that that is the situation?

Mr. Jacobs: Yes, your Honor.

The Court: Well, can you come to some stipulation as to that, Mr. Fink? Subject to its competency?

Mr. Fink: I am sorry. I was talking to Counsel. May we try to get together before we resume?

The Court: Let me find out if there will be other evidence in this case.

Mr. Jacobs: I am not certain. I may want to call another witness.

The Court: Because I have ordered all the people in the other case to come back, and you heard that two of the witnesses, one on each side, have come from a distance. I [383] know you have too, of course. I don't want to cut off your evidence, but I want to try to shorten this, if it is on matters subject to the materiality and weight, that are not subject to dispute. See if you cannot work out a stipulation on this subject of income tax returns.

Mr. Jacobs: May I suggest it now?

The Court: Certainly.

Mr. Jacobs: I suggest a stipulation——

Mr. Ladar: Judge, this is news to me. I am here on behalf of this Union. I think I would be remiss in my duty here if I did not say to your Honor that I would like to protest the use of the income tax statements of the members of this Union for any purpose. I don't think for the purposes of this case anybody had a right to get them, or look at them. If there was something here I felt was going to be vital to you in the determination of the case, I don't think I would make a statement, but I have listened and looked at the statement. I don't see any place on the statement that Mr. Parrish could have entered his income other than the way it is entered.

The Court: Counsel in quite right; this form is only for the use of so-called wage earners. There is another form if you have income from a business or profession; you use another form. Of course, if this form is used, that is the only place it can be entered, but it is the use of this form. [384]

Mr. Ladar: Therefore I have my objection. That he used the particular form 1040-A, I think he could do that. Unless there is some right the Government has to take this information, I would like to lay before your Honor the proposition, but I would like to object on behalf of the members of this Union to the use of their income tax returns in a case such as this. I don't think anybody had a right to take them or look at them.

Mr. Jacobs: May I suggest a stipulation to this effect: that the following named individuals, mem-

bers of the News Vendors Union, engaged in the sale of one of the three papers, the Chronicle, The Examiner, or the Call-Bulletin, that they filed income tax returns for the year 1940 on form 1040-A in which they stated their occupation was news vendor, listed in Item 1 their income from the sale of newspapers under Item 1 as being from salaries, compensation for personal services. On Schedule A they have listed the name of the publisher or newspaper as their employers, and signed the return.

The Court: Well, suppose you gentlemen consider that stipulation.

Mr. Fink: I will consider the stipulation, but your Honor, I point out to the Court that I doubt my right to look at these returns. Counsel has a number of them, obviously. [385]

The Court: Are these copies?

Mr. Jacobs: No.

Mr. Fink: He has a whole group. I would say 35 to 40 there. I don't know if that is accurate. I doubt my right to look at that, and I would think I would want to examine them to see exactly what the different men said before I could enter a stipulation. If a stipulation can be worked out where it is put in general terms, I may be able to accept it without examining them. I don't want to examine them.

Mr. Jacobs: Did you listen to the form of stipulation?

Mr. Fink: I certainly did, and I found you said, "The following named men". I assumed you were going to name each individual.

Mr. Jacobs: Without naming the income in any respect.

Mr. Fink: You said "the following named men".

Mr. Jacobs: That is right.

Mr. Fink: I don't know what names are there.

Mr. Jacobs: These names were taken from a roster furnished by the Union. There is no doubt in my mind that they are Union news vendors engaged in the sale of the plaintiffs' newspapers.

Mr. Fink: I will make this suggestion, your Honor, I will consider the stipulation; Mr. Ladar will furnish me with information necessary, and if I can stipulate to it, I will. [386]

The Court: Very well. Now, aside from that you say there will be some other evidence, you think?

Mr. Jacobs: Yes, two or three witnesses. It should not take more than the remainder of the morning. I am sure of that.

The Court: Because I have all these people coming back. Maybe we better start this case a little earlier, then.

Mr. Jacobs: I hope the Court understands that I tried to be cooperative.

The Court: I am not complaining.

Mr. Jacobs: No pressure was put on me by the Court or Counsel, but I would have gone to undue length by stipulation to shorten the case, because I do not want to extend it indefinitely under your Honor's present feeling.

The Court: All I have been attempting to accomplish is to get Counsel to try to agree upon some of the obvious facts; that is all.

Do you want to look at the 1943 records of The Chronicle referred to?

Mr. Jacobs: Yes, your Honor.

The Court: Well, can the witness bring those at 9:30 tomorrow?

Mr. Jacobs: I think he has left, your Honor.

Mr. Fink: He is back there.

Mr. Ladar: Can you bring the guarantees that you were [387] asked to produce?

Mr. Jacobs: I can confer with Mr. Nicholes.

The Court: See if you cannot get that in shape so that you can produce at 10:00 o'clock. We will take a recess then until 10:00 o'clock.

(Adjourned to Wednesday, April 3, 1946,
at 10:00 o'clock a.m.) [388]

Wednesday, April 3, 1946, 10:00 A.M.

Mr. Jacobs: If your Honor please, at the close of the plaintiff's case, the Government moved for judgment, and at that time I filed a written notice. The motion filed was simply on behalf of the two cases of the Hearst Publishing Company. I overlooked filing a written motion against The Chronicle Company.

The Court: Very well. It may be filed.

Mr. Jacobs: Unless there is some objection, I would like to recall Mr. Casaday for one or two questions.

The Court: Is Mr. Casaday here?

Mr. Fink: Yes, he is here, your Honor. There is no objection upon my part. Mr. Casaday.

J. D. CASADAY

called as a witness for the Government, having been previously sworn, testified as follows:

Direct Examination

By Mr. Jacobs:

Q. You understand, Mr. Casaday, that you are still under oath? A. Yes, sir.

Q. Mr. Casaday, will you state to the Court in what respects, if any, the sale of The San Francisco Examiner by adult street news vendors was different after August 31, 1937, than the way it was sold before, understanding that my question includes [389] the manner in which The San Francisco Examiner distributed these papers to the street vendors in all phases from the time it is printed to the time it is sold to the public.

A. I want to understand your question clearly.

Q. That is right.

A. You mean the manner of distribution of newspapers to the vendors before and after the first of April, 1937?

Q. No.

The Court: August 31, 1937.

A. Or August 31, 1937.

The Court: I gather that is what Counsel means.

Q. (By Mr. Jacobs): I don't mean just the delivery of newspapers to the vendors. I mean the entire practice, the working relations between the vendor and the publishers.

A. Well, now, that question is rather difficult to answer, because in some ways it is ambiguous.

(Testimony of J. D. Casaday)

I would say that the principal difference in the practice in the distribution and sale of newspapers by the representatives of the publishers to the vendors, would be in instructions to the **wholesalers** that definitely these vendors were independent contractors and to treat them as such.

Q. That is the only difference?

A. I beg your pardon?

Q. That is the only difference?

A. That is the principal difference that I could be able to point out to you at this time. [390]

Q. Was there any other difference?

A. Well, I could not think of any right offhand.

Q. Mr. Casaday, prior to August 31, 1937, were any instructions given to the wholesalers as to how they were to be treated, whether they would be treated as employees or independent contractors?

A. I don't believe there was any actual instructions given, Mr. Jacobs, but the inference at all times was that the news vendors were independent contractors.

Q. You mean the members of your circulation department gave the wholesalers to understand in one way or another?

A. That is correct.

Mr. Jacobs: No further questions.

Mr. Fink: No questions.

(Witness excused.)

Mr. Jacobs: We will call Mr. Nicholes, please.

VERN L. NICHOLLES

called as a witness for the Government, having been previously sworn, testified as follows:

Direct Examination

By Mr. Jacobs:

Q. Mr. Nicholes, have you with you any records of the payment of bonuses or guarantees to corner news vendors?

A. Yes, I have a partial record here for 1943, which is as far back as I have records on that.

Q. They are official records of the company?

A. Yes. [391]

Q. What do those records disclose as to the number of vendors engaged in the sale of The Chronicle? Will you state the period, please.

A. The period here is March 14, 1943, until April 11, 1943, that is each week ending, and there were approximately 250 vendors which we have registered here as selling papers, and from their earnings we determined there were around 78 to 80 receiving guarantees.

Q. May I see one of them, please? And what do those records disclose as to the number of individuals who received payments of bonuses or guarantees?

Mr. Fink: Just a minute, your Honor, obviously the objection that the records are the best evidence is good, and I object upon that ground. I don't know that this gentleman has made a survey of these records which appear to be quite volumi-

(Testimony of Vern L. Nicholes.)
nous. I object upon the ground that the records themselves are the best evidence.

The Court: Well, that may be so, I think. Counsel is just taking a short cut. If the witness knows, I will let him answer.

Q. (By Mr. Jacobs): Did you make a study and inspection of these forms?

A. Yes, I glanced over them and hastily made up the figures which seemed to be approximately correct, although they vary from week to week, from one period to another period. This is 1943, but, as I say, those figures were approximately [392] correct.

Q. And what figures are disclosed?

A. What do you mean by that?

Q. How many individuals received payments or bonuses or guarantees?

A. Well, approximately 78 to 80, I would say, out of 250.

Q. And that percentage covers how many different groups that you have there?

A. That is about four or five weeks.

Q. Are you familiar, is it within the province of your duties to ascertain and observe the number of vendors who receive bonuses or guarantees?

A. Yes.

Q. Would you say these figures are representative?

A. Well, no, I would not say in the whole period. They seemed to be along for four or five weeks. For example, at the present time the percentage

(Testimony of Vern L. Nicholes.)

is considerably down, only about sixteen or twenty out of the total.

Q. And after——

Mr. Fink: Let's get the answer.

The Court: Had you finished your answer?

A. Just one or two items there. I stated in 1946, the present period, if you are taking comparative figures, it is considerably less than 1943; it was sixteen to twenty.

Q. (By Mr. Jacobs): Out of how many vendors?

A. Out of approximately the same number of vendors.

Q. Do you recall during the period 1937 to 1940 what percentage [393] of vendors received payment of bonuses and guarantees?

A. No, I don't.

Q. Have you copies of corner complaints in your possession there, Mr. Nicholes?

A. Yes, I do.

Mr. Jacobs: Can this be marked for identification, please?

(The document referred to was marked Defendant's Exhibit AF for identification.)

Q. (By Mr. Jacobs): I show you Defendant's Exhibit AF for identification and ask you what it is?

A. This is some triplicate copies of corner complaints during part of the period of 1943 and 1944 which the wholesaler turns into the circulation department.

(Testimony of Vern L. Nicholes.)

Mr. Jacobs: I offer it in evidence.

The Court: This is similar to the others?

Mr. Jacobs: Yes, sir.

The Court: Very well.

(The document referred to was received in evidence as Defendant's Exhibit AF.)

Q. (By Mr. Jacobs): Have you any further corner complaints?

A. No, sir, that is all I have.

Q. Mr. Nicholes, you stated that approximately 70 vendors received payments of bonuses or guarantees for the period you mention in 1943. Are you sure in your own mind that that includes both bonuses and the guarantees? [394]

Mr. Fink: Just a minute, I object—I withdraw the objection.

A. I think the Court should be informed as to the difference between what we call bonus, and guarantee. It is the same thing. The bonus is dubbed that for our own information to distinguish between the actual amount of guaranteed as earnings per week and an additional amount which is guaranteed in addition to the other amount of earnings, which is dubbed by the term "bonus".

The Court: That is not clear to me. What do you mean by that?

Mr. Jacobs: It is clear in the contract in evidence.

The Court: Is that it?

Mr. Jacobs: The contract provides for the payment of amounts not designated as bonuses.

(Testimony of Vern L. Nicholes.)

Q. Is it correct to state, Mr. Nicholes, that in the years 1942 and subsequent thereto the contracts with the Union provided that in the event a news vendor made a certain minimum profit in the contract, but did not make \$40—I think that was the figure—he was entitled to receive an additional amount?

A. That is correct, although I don't believe it was \$40 at that time in 1942.

Q. If he made over the minimum, but less than a certain amount, he would get an additional amount from the publishers? A. That is correct. [395]

Q. When you stated approximately 70 vendors received bonuses or guarantees, are you sure in your own mind that that number includes both bonuses and guarantees? A. It does.

Mr. Jacobs: No further questions.

The Court: Any questions?

Mr. Fink: No.

The Court: That is all.

(Witness excused.)

Mr. Jacobs: Mr. Forbes.

H. F. FORBES

called as a witness for the Government; sworn.

The Clerk: State your name to the Court, please.

A. H. F. Forbes.

Direct Examination

By Mr. Jacobs:

Q. Mr. Forbes, you are employed by The Chronicle? A. Yes, sir.

(Testimony of H. F. Forbes.)

Q. In what capacity?

A. City Circulation Manager.

Q. How long have you held that position?

A. About five years, I cannot recall for sure.

Q. Did you work for The Chronicle prior to that time? A. Yes, sir, since 1932.

Q. In what capacity?

A. Well, in various capacities.

Q. In the circulation department?

A. In the circulation department entirely, though.

Q. I show you Defendant's Exhibit AF, which has been introduced [396] in evidence, which are copies of the corner complaints, and ask you if any of your duties have any relation to the corner complaints? A. Yes, sir, they do.

Q. Will you state what the relationship to the corner complaints is?

A. When the District Manager writes out a corner complaint——

Q. You mean the wholesaler?

A. When the wholesaler writes out a corner complaint, the copy of the complaint is given to me, and if any action is required, I call the Vendors Union and as a rule I speak to Mr. Kaloch, and pass on the complaint to him.

Q. What is the function of Mr. Kaloch?

A. He is the business agent of the Vendors Union.

Q. How long has that practice been in force?

A. It has always been in force as far as I know.

(Testimony of H. F. Forbes.)

Q. Are these made in triplicate?

Mr. Fink: Was that an inadvertent word,, "enforced"? Enforced by whom?

Mr. Jacobs: In force, not enforced.

Mr. Fink: I am sorry.

A. These, as a rule, are made in triplicate.

Q. (By Mr. Jacobs): What disposition is made of the copies, if any?

A. Well, the reason we make them in triplicate is so that the various heads of departments will have a record of what happened, and in case there was some dispute about payment, or something [397] like that, when the payment came in we just marked it paid and filed it away. If we did not have it in triplicate, we would not have sufficient to keep the records intact.

The Court: He wants to know who gets the copies.

A. Pardon me. I receive two copies and Mr. Nicholes receives the third copy.

Q. (By Mr. Jacobs): You keep two copies?

A. I keep two copies and one I will throw away, one I file away in a file which I will keep maybe a month or two; the other, I have pending file. When that particular business is cleared up, I will scratch it off, throw it away.

Q. (By Mr. Jacobs): Have you had instances with corner complaints where they noted delinquencies or violations of the contract by a vendor?

A. I did not get the question.

Q. Have there been instances?

A. Yes, sir.

(Testimony of H. F. Forbes.)

Q. And would such a typical instance be the failure of a vendor to stay on the corner?

A. It could be such an instance. I don't know whether it is typical.

Q. You have had such instances?

A. Yes, sir.

Q. What would you say to Mr. Kaloch with reference to such a complaint?

A. I would notify him that Mr. So-and-So on such-and-such a corner was reported to have gone off the corner before the established quitting time.

Q. Would you in any way state the dissatisfaction of the [398] publishers with that performance?

A. I think that would be implied. I don't know that I would state it.

Q. Did you expect him to take action upon those complaints?

A. The Union will take action according to what it sees fit. In some cases we expect them to take action; in other cases we merely notify them of it, so——

Q. And in those——

Mr. Fink: Let the witness finish.

A. And in some cases we will notify them, knowing no action will be taken.

Q. (By Mr. Jacobs): Now, in instances in which you expect them to take action, what do you do to ascertain whether action has been taken?

A. In the event a vendor fails to pay for papers he buys from us, if I notified Mr. Kaloch that he owes us, say, \$3, I keep a memorandum of the third

(Testimony of H. F. Forbes.)

copy of the corner complaint on my desk. Now, if the vendor pays up the following evening, I am advised of that by the wholesaler, and I mark that paid. Now, if he does not pay, then we have a system of collection which is explained in the contract.

Q. There have been cases, have there not, when you have stated to Mr. Kaloch that the vendor was incompetent, based on the reports of the wholesaler? A. Yes.

Q. And what do you state in such cases?

A. In cases of incompetents, generally they are the result of [399] intoxication, something of that nature, and as soon as the vendor is reported intoxicated, Mr. Kaloch is advised immediately. Then he, himself, does what he feels is best to do.

Q. You have no interest in any action he takes on those complaints?

A. We have an interest, definitely.

Q. You ascertain what action is taken, do you not?

A. We would naturally know. Mr. Kaloch, it has been his practice to go down to the corner to see if the complaint is correct. If he finds the man intoxicated, he generally replaces the intoxicated man with a sober man. We would know, because we have to supply the new man with papers, yes, sir.

Q. Do you know of cases where men have been fined by the Union? A. No, sir.

Q. You have never heard of them?

A. I have heard of them, but I don't know.

(Testimony of H. F. Forbes.)

Q. Have you ever told Mr. Kaloch that a vendor was no longer useful as a vendor?

A. I don't know that I have used the words "no longer useful". I might have said that the sale was not as good as the former man's, something of that nature. I don't quite connect the word "useful" there.

Q. Did you ever state to Mr. Kaloch that a particular vendor's contract would be terminated?

A. Yes, I have stated to Mr. Kaloch that a contract would be terminated.

Q. For cause?

A. Yes, sir, according to the contract.

Mr. Jacobs: No further questions. [400]

Mr. Fink: No questions.

The Court: That is all.

The Witness: Thank you.

(Witness excused.)

Mr. Jacobs: Mr. McCaffrey.

MORRIS P. McCAFFREY

called as a witness for the Government; sworn.

The Clerk: State your name to the Court.

A. Morris P. McCaffrey.

Direct Examination

By Mr. Jacobs:

Q. Mr. Caffrey, where are you employed?

A. The California Employment Stabilization Commission.

(Testimony of Morris P. McCaffrey.)

Q. What are your duties there?

A. Principal Counsel for the Commission.

Q. How long have you held that position?

A. Since February of 1936.

Q. That was your function and duty in 1941?

A. It was, under a different title, however. At that time it was known as the Rules and Regulations Officer.

Q. Do you deal with records of the California Employment Commission? A. Yes, I do.

Q. What is your connection with those records?

A. Records involving disputes before the Commission, so far as benefit payments, or tax collections, are concerned, those records generally are referred to the legal department. [401]

Q. Where?

A. The legal department of the Department of Employment.

Q. Those records are kept in the legal department? A. That is correct.

Mr. Jacobs: Will you mark that for identification.

(The document referred to was marked Defendant's Exhibit AG for identification.)

Mr. Jacobs: Mark that for identification, too, please.

(The document referred to was marked Defendant's Exhibit AH for identification.)

(Testimony of Morris P. McCaffrey.)

Q. (By Mr. Jacobs): Mr. McCaffrey, I show you Defendant's Exhibit AG and Defendant's Exhibit AH for identification. I show you Defendant's AG for identification, and ask you what it is.

A. This exhibit contains an excerpt from the Commission's minutes of a meeting of the Commission held under date of May 6, 1941, in Sacramento, California.

Q. Have you seen this before?

A. Yes, I have.

Q. This came from the records of the Commission? A. They did.

Q. I show you Defendant's Exhibit AH for identification, and ask you what it is?

A. Exhibit AH is a statement of the Newspaper and Periodical Vendors and Distributors Union, regarding a proposed change of Rule 8.19 of the California Employment Commission. [402]

Q. That was filed with the Commission?

A. It was.

Q. And is taken from the records of the Commission? A. That is correct.

Mr. Jacobs: I offer in evidence Defendant's Exhibit AG and Defendant's Exhibit AH.

Mr. Fink: I object to it upon the ground that it is incompetent, irrelevant and immaterial; upon the further ground that no proper foundation has been laid; upon the further ground that they tend to prove nothing in issue in this case, if your Honor please.

The Court: What are they about?

(Testimony of Morris P. McCaffrey.)

Mr. Jacobs: If given an opportunity I will tell the Court. Defendant's Exhibit AG is a transcript, a certified copy of a transcript of the minutes of the meeting of the California Employment Commission, containing testimony of Mr. Charles H. Bowers then secretary and treasurer of the News Vendors Union here involved, in which he made—I take the liberty of interpreting his testimony before the Commission, his remarks before the Commission—in which he stated, mind you, speaking as secretary and treasurer of the Union, that in his opinion under the then existing contracts the News Vendors were not independent contractors. That, I think, is a fair statement of the substance of his testimony.

The Court: Just a minute. What was the nature of the hearing? What were the hearings about?

Mr. Fink: They had to do with the revision of rule 8.19 of the California Employment Commission, which was a rule exempting from taxation, under the California system, the newsboys in the State. It has been said that it included the vendors, but I do not believe that it did. However, that is immaterial.

The Court: If I admit this in evidence, then I am just accepting the opinion of someone else.

Mr. Fink: That is entirely true, your Honor. And may the record also show, your Honor, that Mr. Charles H. Bowers is present in court at this time, under subpoena of Mr. Jacobs, and if they

(Testimony of Morris P. McCaffrey.)

want to prove this record and prove Mr. Bowers' views, he is available.

The Court: You are not objecting that this is not a correct record, are you?

Mr. Fink: No, your Honor. I am objecting on the ground that it is incompetent, irrelevant and immaterial, that no proper foundation has been laid, and that it does not tend to prove any issues, prove or disprove any issues in this case.

Mr. Linn: I think, if your Honor please, it might be material to inspect the California Commission's rule, which was under consideration. It was a definite rule of the Commission that news vendors were independent contractors, and therefore not subject to the Act. The Newspaper Vendors Union participated in these hearings and contended that they were [404] employees, and the admissibility, despite the contract—the contract was brought up and rehashed—it shows what we believe to be a consistent course of conduct on the part of one of the parties to this contract, that they were employees.

The Court: You don't mean "course of conduct".

Mr. Linn: Contention.

The Court: They said.

Mr. Linn: They always stated that.

Mr. Jacobs: And represented.

Mr. Linn: Made representations to that.

Mr. Jacobs: This is not binding on this court; I have set no such illusion. I do believe that belief is material.

(Testimony of Morris P. McCaffrey.)

The Court: There seems to be some conflict, then, between the officers of the Union on this.

Mr. Jacobs: Definitely, yes.

The Court: One officer said they were independent contractors, and the other says they were not.

Mr. Jacobs: These are the views of the secretary and treasurer who, under the by-laws, was the acting head, as secretary and treasurer, during the period here involved.

The Court: My own opinion is that a mere statement of opinion by a party involved, of what he thinks is the status, is of no help to the Court.

Mr. Jacobs: This was not a personal individual opinion.

The Court: He was an officer of the Union. By the same [405] token, if I considered that as having weight, I would have to give weight to the statement of the newspaper publishers. They think it is an independent contract, and I am not bound, nor should I be influenced by a statement of either party as to what he thinks the relationship is, but I should determine it on what, in fact, the relationship is.

Mr. Jacobs: My understanding, from the testimony introduced by the plaintiffs, is that they think it is material that the publishers even think it is one of independent contractor.

The Court: No, the testimony was that they wanted an independent contractor relationship; that is why they put it in the contract. Whether or not they got it is what the Court has to determine.

(Testimony of Morris P. McCaffrey.)

You may have it marked for identification, but I see no point in having it admitted in evidence. If it is admitted in evidence, then I would have to give some weight to it, one way or the other, as evidence, and I do not think it is proper evidence. You may leave it, and have it marked for identification so the record will show it has been offered, and I will sustain the objection to its admission in evidence.

Mr. Jacobs: Mr. Fink, have you the counter-proposal?

Mr. Fink: Yes. May it please the Court, I am delivering to Counsel the counter-proposal of 1937 which he has asked for. Now, with reference to the other counter-proposals, as Mr. [406] Bitler testified——

The Court: Just a minute. Is this all of this witness?

Mr. Fink: No questions. You were an excellent witness, Mr. McCaffrey.

(Witness excused.)

The Court: How about the other exhibit? You had another exhibit that you had marked for identification.

Mr. Fink: It is the same thing, your Honor, it relates to the same thing.

Mr. Jacobs: I offered them both in evidence.

The Court: Both covered the same point?

Mr. Jacobs: Yes, your Honor.

The Court: The offer of the second exhibit in evidence will be denied. You may have them marked for identification.

Mr. Fink: Now, Mr. Jacobs, I have delivered the proposal of June, 1937. You recall Mr. Bitler's testimony that subsequent counter-proposals were copies of the previous contracts which are already in evidence.

Mr. Jacobs: Do I understand that Counsel stipulates that the document which I have in my hand is the first counter-proposal submitted by the publishers and the Publishers Association?

Mr. Fink: I have delivered it to you as that.

Mr. Jacobs: I offer it in evidence as such, without further identification, under the stipulation of Counsel. [407]

The Court: Very well.

(The document referred to was admitted in evidence as Defendant's Exhibit AI.)

Mr. Jacobs: The Government offers to stipulate that the document I have in my hand consisting of twelve pages and four exhibits thereto, is a true copy of the letter written by the News Vendors Union to the Commissioner of Internal Revenue, Deputy Commissioner Self, dated March 16, 1945.

Mr. Fink: No objection.

The Court: It may be admitted in evidence.

Mr. Jacobs: The Government offers it in evidence pursuant to that stipulation.

Mr. Fink: I did not hear you.

Mr. Jacobs: The Government offers it in evidence.

Mr. Fink: No objection at all.

The Court: Let it be marked.

(The document referred to was marked Defendant's Exhibit AJ in evidence.)

Mr. Jacobs: May it please the Court, from the discussion late yesterday afternoon, there seemed to be a touchiness about the use of the income tax returns of the news vendors. We have made an investigation of the right to use those returns, because I, no more than anybody else, have any desire to break the law or the regulations or put in anything [408] otherwise privileged. The Commissioner of Internal Revenue has handed down a Treasury decision—a Treasury decision having the force and effect of a Treasury regulation—under which he interprets the law and puts into force, regulations authorized by law. Under the Treasury decision dated September 29, 1939, there is specific provision for the use of returns in litigation, which provides as follows:

“The return of an individual, partnership, corporation or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that

publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto."

showing that the news vendors made a report on an income tax return of their income from the sale of newspapers on the form 1040-A, and under the heading that recites "From wages, salaries, commissions" et cetera, I would not admit the income tax returns of these parties in evidence, because I do not feel that there is any necessity whatsoever for making a public disclosure, by the admission in evidence of the returns of these men, of their income tax returns.

Mr. Fink: If the Court please, I might say this: I attempted to reach an agreement, or Mr. Jacobs attempted to reach an agreement with me last night on a stipulation. We were a little apart, but I now agree to stipulate that a number of vendors in the year 1940 filed income tax returns on form 1040-A. And if that stipulation is accepted, the controversy is over.

Mr. Jacobs: Well——

Mr. Fink: What more could the Government get if it introduced them in evidence?

Mr. Jacobs: Well, this is what I would like to have, it simply amplifies the matter without disclosing the content of the returns, the Government would offer to stipulate that a specific number of individuals, of whom we have the returns, there are a substantial number of individuals who were vendors, news vendors, members of the News Vendors Union and engaged in the sale of the plaintiffs' newspapers during the year 1940, [410] filed income tax returns for 1940 on form 1040-A, in which they stated in the appropriate place their occupation being that of news vendor.

Mr. Fink: That is argument, isn't it, Counsel?

Mr. Jacobs: No, it is stated in the form.

Mr. Fink: Well, I say that is argument.

The Court: Well, you gentlemen seem to have difficulty agreeing to this. I see what you are getting at. Will you permit me to make a statement and see if you can agree?

Mr. Fink: Certainly.

The Court: All right. Will it be stipulated—how many forms have you?

Mr. Jacobs: I have fifty, I think.

The Court: Will it be stipulated that approximately 50 news vendors who are members of the News Vendors Union, in 1940 filed income tax returns on form 1040-A with the Collector of Internal Revenue, in which they reported receipt of money from the plaintiffs in this case, under the heading—

Mr. Fink: Schedule A, your Honor.

The Court: Under the heading "Schedule A," in such returns; in which they reported in such returns the receipt of moneys by them from the San Francisco newspapers who are plaintiffs in this action. Will that cover it?

Mr. Fink: I will accept the Court's stipulation.

Mr. Jacobs: The Government agrees to that stipulation. [411]

The Court: Well, that settles that. Now, you can return the exhibit.

Mr. Jacobs: I was about to bring that question up. I would like to have one of those forms in evidence.

Mr. Fink: Substitute a blank form for Mr. Parrish's return.

The Court: Substitute a blank form if you wish, but I see no reason for keeping one of the news vendor's tax returns in the record of this case. I don't see that it serves any purpose.

Mr. Jacobs: It is illustrative of the case. If your Honor desires a blank form——

The Court: You may substitute a blank form, and the particular exhibit may be returned.

Mr. Jacobs: May we have a short recess at this time; your Honor?

The Court: The Court will recess.

(Recess.)

Mr. Jacobs: At this time, if it please the court, the Government rests, and renews its motion for judgment at the close of the plaintiffs' case.

The Court: Is there any rebuttal testimony, or is all the evidence closed?

Mr. Fink: I think, if your Honor please, there is no necessity for any rebuttal. [412]

The Clerk: What shall I do with regard to this exhibit?

The Court: Well, this Defendant's Exhibit, "N" for identification may be returned to whoever produced it in court.

Mr. Jacobs: I will return it to the files of the Collector's office.

The Court: You may furnish a blank form.

Mr. Jacobs: May the record show I am producing a blank form.

The Court: How do you want to submit this matter, gentlemen, by briefs?

Mr. Fink: If your Honor please, I think so far as the plaintiffs are concerned, I would like the opportunity for a short oral argument.

The Court: Well, you both may discuss it for the rest of the morning, and supplement it by written briefs. Is that satisfactory?

Mr. Fink: That is satisfactory.

Mr. Jacobs: Yes, your Honor.

Mr. Fink: Now, what order of procedure shall we take, if your Honor please? Are the respective motions of the Government to be taken under submission and ruled upon at the time the Court makes its ultimate decision?

The Court: Yes.

(Argument by Mr. Fink.)

(Argument by Mr. Ladar.) [413]

Mr. Jacobs: May it please the Court, at this time to substitute a copy of form 1040-A, for the form offered in evidence.

The Court: Very well, it may be given the same exhibit number.

(The document referred to was marked in evidence Defendant's Exhibit N.)

(Argument by Mr. Jacobs.)

The Court: I can see that argument in this case, if we really present it the way you want to on both sides, would require some substantial time. Would you rather argue this case, or would you rather submit a memorandum?

Mr. Fink: So far as I am concerned, I would prefer oral argument to start with. I am perfectly willing to keep within any limits the Court outlines, but I think the case is of sufficient importance to justify oral argument and brief it.

The Court: Would you want a brief, too?

Mr. Fink: Yes, your Honor.

The Court: If there is oral argument, the brief then should be a statement merely of the legal points.

Mr. Fink: Yes, your Honor.

The Court: How do you feel about that, Mr. Jacobs?

Mr. Jacobs: Well, I have prepared a brief prior to coming out here, which was devoted solely to the pleadings. I don't think, as I stated in my opening statement, that the [414] evidence has materially altered what is disclosed by the contract and the pleadings. All I would ask is an opportunity

to reply to Mr. Fink's brief. He can have a copy of this brief at the close of this proceeding.

Mr. Fink: I don't think you understand the Court's question.

The Court: Would you want to argue the matter orally?

Mr. Jacobs: Solely?

The Court: I have no objection to your arguing orally, but if then you are going to file a brief, the brief then should be confined to a statement of the legal points involved rather than a long story of the case.

Mr. Jacobs: I don't know whether this brief is confined to your Honor's idea of the points. It is not tremendously long.

The Court: I am not thinking in terms of length, but I just wanted a statement of the applicable principles. If you are going to orally argue it, the main thing is, if you are going to orally argue. I have to try to find the time for you, and for you to prepare.

Mr. Fink: Your honor, does it not somewhat depend on Counsel's engagements? I understand he was to try some other things, or had some other matter here.

The Court: Are you going to be here some time?

Mr. Jacobs: No, your Honor. I love San Francisco dearly, [415] but I have obligations in the east. I must go back. I planned to leave by airplane this evening if I can.

May I suggest, this brief will help clarify the situation. At the close of the argument, I will file

this brief and suggest that plaintiffs have the opportunity to examine it and reply, and I be given an opportunity to reply to theirs.

The Court: I think the plaintiffs should have the opening. You have made a motion for judgment which takes the whole case under advisement. The plaintiffs have the burden of proof. I think they should have an opportunity to file the opening brief and a reply brief. That will give you an opportunity, as well, to be able to answer what he says.

Mr. Jacobs: If there is any advantage that goes with the opening brief, I will forego it.

The Court: That is the proper procedure. I know you would like to argue the matter, Mr. Fink, but I think this case is going largely, to depend on the question of law. There isn't any real dispute as to the facts of this case. It is a question of what is drawn from the facts that reflects on the question of the status of the parties, rather than the Court having to resolve any question of fact. I think that is a fair statement. It is very difficult, in the pressure of work in this district, with a lot of cases to try, for the Court to keep in mind these oral arguments. I would like to find out about some problems that trouble me. I would [416] prefer that the matter be submitted to me in writing so I could study it over and, as I said to you before, Mr. Jacobs, what I am concerned with, what is bothering me about this case, is the application of this Social Security Act in a case where the parties themselves have dealt with it, and where there is not any conflict apparently between them

as to how far the liberality of the Social Security Act would be carried into the decisions of the Supreme Court. I would like you to take that up in your brief, Counsel.

(Submitted 30-30- and 15.) [417]

Certificate of Reporter

I, W. A. Foster, Official Reporter, certify that the foregoing 177 pages is true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

Certificate of Reporter

I, Carolyn Blair, Official Reporter, certify that the foregoing, 240 pages, is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ CAROLYN R. BLAIR.

[Endorsed]: No. 11781. United States Circuit Court of Appeals for the Ninth Circuit. Hearst Publications, Incorporated, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 10, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11781

HEARST PUBLICATIONS, INCORPORATED,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR ORDER DISPENSING WITH
THE NECESSITY OF PRINTING EXHIBITS

Appellant moves the court to enter an order dispensing with the necessity of printing the exhibits which were transmitted to the Clerk of the above-mentioned court as a part of the record on appeal, and directing that the exhibits be considered in their original form, and in support thereof states:

1. That a part of the record on appeal in this case consists of voluminous and bulky exhibits which were transmitted to the Clerk of the above-mentioned court in their original form. The same exhibits are by stipulation made a part of the record on appeal in three other cases pending on appeal in said court, namely, *Hearst Publications, Incorporated vs. United States of America*—11782; *The Chronicle Publishing Co. vs. United States of America*—11783; *The Chronicle Publishing Co. vs. United States of America*—11784, the cases having been consolidated for trial in the District Court.

2. Said exhibits are so voluminous and bulky that the printing thereof would entail expense so great as to be almost prohibitive. It is believed that the matter can be presented to the court in the briefs and in oral argument in such manner that undue inconvenience will not result from the fact that the exhibits are not printed.

Dated this 20th day of November, 1947.

CALKINS, HALL, LINFORTH
& CONRAD,

By /s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,
Attorneys for Appellant.

State of California,
City and County of San Francisco—ss.

James I. Johnson, being first duly sworn, deposes and says:

That he is one of the attorneys for appellant in the above-entitled action; that he has read the foregoing motion and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be made on information or belief, and as to those matters that he believes it to be true.

/s/ JAMES I. JOHNSON,

Subscribed and sworn to before me this 20th day of November, 1947.

[Seal] /s/ EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 28, 1947.

[Title of Circuit Court of Appeals and Cause.]

ORDER DISPENSING WITH THE
NECESSITY OF PRINTING EXHIBITS

On motion of appellant, and for good cause shown, it is hereby ordered that the printing of the exhibits transmitted to the Clerk of this court as a part of the record on appeal, which exhibits are also by stipulation made a part of the record on appeal in three other cases pending before this court, namely, *Hearst Publications, Incorporated vs. United States of America*—11782; *The Chronicle Publishing Co. vs. United States of America*—11783; *The Chronicle Publishing Co. vs. United States of America*—11784, be, and the same hereby is, dispensed with, and it is further ordered that the said exhibits shall be considered by this court in their original form to the same extent as if they had been printed.

Dated November 21, 1947.

/s/ FRANCIS A. GARRECHT,
Senior United State Circuit
Judge.

Appellee consents to the granting of the foregoing order.

FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed Nov. 21, 1947.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY, AND
DESIGNATION OF THE PARTS OF THE
RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF

Appellant intends to rely upon each of the following points:

1. The court erred in holding that the news vendors involved were employees of appellant and were not independent contractors.
2. The court erred in the findings of fact upon which its decision was based.
3. The court erred in its conclusions of law.

Appellant designates the entire record on appeal as that which is necessary for the consideration of said points, the exhibits, however, to be considered in their original form.

CALKINS, HALL, LINFORTH
& CONRAD,

By /s/ REGINALD H. LINFORTH,
/s/ JAMES I. JOHNSON,

Attorneys for Appellant.

Received a true copy of the foregoing this 3rd day
of November, 1947.

FRANK J. HENNESSY,
United States Attorney.

By /s/ W. E. LICKING,

[Endorsed]: Filed Nov. 25, 1947.

